LAW OF THE SEA NEGOTIATIONS

HEARINGS

BEFORE THE

SUBCOMMITTEE ON ARMS CONTROL, OCEANS, INTERNATIONAL OPERATIONS AND ENVIRONMENT

OF THE

COMMITTEE ON FOREIGN RELATIONS UNITED STATES SENATE

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LAW OF THE SEA NEGOTIATIONS

THURSDAY, JUNE 4, 1981

UNITED STATES SENATE,
SUBCOMMITTEE ON ARMS CONTROL, OCEANS,
INTERNATIONAL OPERATIONS AND ENVIRONMENT OF THE
COMMITTEE ON FOREIGN RELATIONS,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:08 a.m., in room 4221, Dirksen Senate Office Building, Hon. Larry Pressler (chairman of the subcommittee) presiding.

Present: Senators Pressler, Percy, and Pell.

Senator PRESSLER. I will call this meeting of the Subcommittee on Arms Control, Oceans, International Operations and the Environment to order.

I would like to take this opportunity to welcome Mr. Malone to the Foreign Relations Committee.

Mr. Malone, I understand you were formally sworn in on Monday, following your confirmation in the Senate without a single negative vote. If the length of your title is any indication of your abilities, and I am sure it is, you are a valuable advisor to the Secretary of State and a vital part of the Reagan administration.

The Law of the Sea negotiations are among the most important issues now confronting the administration. I have supported the administration's decision to conduct a thorough review of the present draft treaty in an effort to develop realistic positions on such issues as deep seabed mining and other matters.

This morning I received some of the working papers from that review process, and I look forward to discussions with you, Mr. Malone, on the substance of the U.S. position.

However, let me also express a concern that the review process must move forward. We must carefully analyze our relationships with those other nations with whom we are dealing.

This morning we are here to hear an update or a report on what has transpired and what is going to happen in the August meeting in Geneva, what our position may be or will be.

Mr. Malone, we welcome you.

STATEMENT OF JAMES L. MALONE, ASSISTANT SECRETARY OF STATE FOR OCEANS AND INTERNATIONAL ENVIRONMENTAL AND SCIENTIFIC AFFAIRS, ACCOMPANIED BY THEODORE KRONMILLER, ACTING DEPUTY ASSISTANT SECRETARY OF STATE FOR OCEANS AND FISHERIES AFFAIRS

Mr. MALONE. Thank you very much, Mr. Chairman. It is, indeed, a pleasure to be here and I appreciate your very kind remarks on my confirmation and swearing in. It was a fairly lengthy process,

but I was, indeed, gratified that the Senate saw fit to move ahead unanimously on my confirmation.

I have with me at the table this morning Mr. Theodore Kronmiller who is the acting Deputy Assistant Secretary of State for Oceans and Fisheries Affairs and is chairing the interdepartmental group that is responsible for the review of the Law of the Sea.

Mr. Chairman, I have a prepared statement which I would propose to read at this time.

It is a pleasure to be given the opportunity to speak today about the recently concluded session of the Law of the Sea Conference and the administration's policy review process.

I know that the Law of the Sea has long been of interest to your subcommittee. I would like to assure you at the outset that you and other interested Members of Congress will be fully consulted during the course of the review, and indeed, this process of consultation already has begun on an informal basis.

My statement will attempt to put into perspective this administration's approach to the Third United Nations Conference on the Law of the Sea and the reasons why we adopted the decisions to slow down the negotiating process just as it may have been about to be finalized last August.

Preparation for the Third United Nations Conference on the Law of the Sea began, as you know, in 1966. During the 15-year history of these negotiations, the United States has sought to protect its oceans interests and has pressed for urgent solutions to what it perceived to be the problems of the Law of the Sea.

The developing countries have approached the negotiations with a different perspective and have sought economic concessions from the industrialized world, chiefly in the deep seabed mining part of the negotiations.

Increasingly important compromises to developing country interests were accepted by our negotiators in order to achieve the protection of U.S. interests as they defined them.

When this administration took office, it was confronted with an informal draft convention on the Law of the Sea containing a number of provisions raising concerns on which I shall elaborate shortly. We were informed that the Conference was on the verge of finalizing this text and that there was an expectation that the negotiations would conclude in 1981.

Many of the provisions of the draft convention prompted substantial criticism from industry, from the Congress, and from the American public. There also was some question whether the draft convention was consistent with the stated goals of the Reagan administration. Therefore, the administration decided that it would be better to face criticism in the United Nations, than to proceed prematurely to finalize a treaty that might fail to further our national interests.

Many comments were made by foreign delegates and in the U.S. press about the manner in which we announced our decision to conduct a policy review and to appoint a new chief negotiator. Let me report to this subcommittee that the decision to conduct the review was made as rapidly as possible, consistent with the many

burdens and competing priorities faced by any administration that is new to office.

A change in the leadership of the American delegation was essential, in our judgment. This was in order to insure that other countries clearly understood our seriousness of purpose with respect to the review. That action also was necessary in order to send the signal to other delegations that the United States could not be induced to return immediately, and thus prematurely, to the bargaining table by offers of minor technical changes to the draft convention.

I am sure that you also can appreciate that it would be less difficult for a new head of delegation to adhere to a negotiating posture that diverged from our past approach.

The argument has been made by some that the United States is failing to keep its commitments by reviewing its policy and possibly changing its position on subjects of importance. This, in my judgment, is an unconvincing argument.

Shortly before the Carter administration took office, leading representatives of the developing countries at the Conference rejected treaty provisions they previously had negotiated and demanded substantial changes to the draft text then on the table as the price of future agreement. Those delegates entertained the hope that more favorable concessions could be extracted from a new administration which was thought to be more sympathetic to developing country positions in United Nations forums.

It always has been well understood at the Law of the Sea Conference that a successful treaty must be based on a package deal. The position that the administration will take toward the contents of that package remains to be determined in the course of the review process. No nation is committed to the text in the sense that it is bound by it. In this regard, I would like to quote from the Conference President's preparatory note to the draft convention: "This text, like its predecessor, will be informal in character. It is a negotiating text and not a negotiated text, and does not prejudge the position of any delegation."

Mr. Chairman, let me list for you some of the features of the present draft convention to which I referred earlier as raising concerns, and I underscore that these are concerns.

They raise concerns because there have been questions whether these features are consistent with U.S. interests. I will not today seek to identify other features of the text which have been considered to preserve or promote other U.S. interests. This will be part of the review process.

The areas of concern include the following:

The draft convention places under burdensome international regulation the development of all of the resources of the seabed and subsoil beyond the limits of national jurisdiction, representing approximately two-thirds of the Earth's submerged lands. These resources include polymetallic nodules. They also include mineral deposits beneath the surface of the seabed about which nothing is known today, but which may be of substantial importance in the future.

The draft convention would establish a supranational mining company, called the Enterprise, which would benefit from significant discriminatory advantages relative to the companies of industrialized

countries. Arguably, it eventually could monopolize production of seabed minerals. Moreover, the draft convention requires the United States and other nations to fund the initial capitalization of the Enterprise in proportion to their contributions to the United Nations.

Through its transfer of technology provisions, the draft convention compels the sale of proprietary information and technology now largely in U.S. hands. Under the draft convention, with certain restrictions, the Enterprise, through mandatory transfer, is guaranteed access on request to the seabed mining technology owned by private companies and also technology used by them but owned by others. The text further guarantees similar access to privately owned technology by any developing country planning to go into seabed mining. We must also carefully consider how such provisions relate to security-related technology.

The draft convention limits the annual production of manganese nodules from the deep seabed, as well as the amount which any one company can mine for the first 20 years of production. The stated purpose of these controls is to avoid damaging the economy of any country which produces the same commodities on land. In short, it attempts to insulate land-based producers from competition with seabed mining. In doing so, the draft treaty could discourage potential investors, thereby creating artificial scarcities. In allocating seabed production, the International Seabed Authority is granted substantial discretion to select among competing applicants. Such discretion could be used to deny contracts to qualified American companies.

The draft convention creates a one-nation one-vote international organization which is governed by an assembly and a 36-member executive council. In the council, the Soviet Union and its allies have three guaranteed seats, but the United States must compete with its allies for any representation. The assembly is characterized as the "supreme" organ and the specific policy decisions of the council must conform to the general policies of the assembly.

The draft convention provides that, after 15 years of production, the provisions of the treaty will be reviewed to determine whether it has fulfiled overriding policy considerations, such as protection of land-based producers, promotion of Enterprise operations, and equitable distribution of mining rights. If two-thirds of the states parties to the treaty wish to amend provisions concerning the system of exploitation, they may do so after 5 years of negotiation and after ratification by two-thirds of the states parties. If the United States were to disagree with duly ratified changes, it would be bound by them nevertheless, unless it exercised its option to denounce the entire treaty.

The draft convention imposes revenue-sharing obligations on seabed mining corporations which would significantly increase the costs of seabed mining.

The draft convention imposes an international revenue sharing obligation on the production of hydrocarbons from the continental shelf beyond the 200 nautical mile limit. Developing countries that are net importers of hyrocarbons are exempt from the obligation.

The draft convention contains provisions concerning liberation movements, like the PLO, and their eligibility to obtain a share of the revenues of the Seabed Authority.

The draft convention lacks any provisions for protecting investments made prior to entry into force of the convention.

Mr. Chairman, on the basis of the foregoing difficulties and others that I have not taken the time to mention, it is the best judgment of this administration that this draft convention would not obtain the advice and consent of the U.S. Senate. The provisions that I have mentioned raise questions for this administration. We seriously must consider whether those provisions should be included in a treaty to which the United States would become a party, unless there were a countervailing national policy interest.

The review will evaluate all of our national interests and objectives, including national security, to determine the extent to which they are protected by the draft convention, to identify necessary modifications to the draft convention. The review also will examine with great care whether these same interests and objectives would fare better or worse in the absence of a treaty.

During the course of the review, we will consult with the Congress, which I have mentioned has already started on an informal basis. We will consult with other nations, including our principal allies, and with a broad spectrum of the private sector. We anticipate that this will be a fairly lengthy process.

The administration believes that any decision concerning a subject as comprehensive and complex as this one must be taken with deliberation and with keen understanding of foreign and domestic reactions. Accordingly, we have determined that the policy review process cannot be fully completed before the resumed Tenth Session of the Law of the Sea Conference in Geneva beginning this August 3. We must have time to insure adequate opportunity to test our tentative views with the widest possible number of countries.

At the recently concluded session of the Conference in New York, disappointment and apprehension were, indeed, registered at the decision of the United States to undertake such a sweeping review as we are now embarked upon. However, this reaction was not universal.

The administration realizes the concern and disappointment that this decision has engendered. Nevertheless, we feel strongly that the American people would wish to see this review occur, rather than be plunged headlong into this treaty.

We think that the world community, too, will be better served, if we return to the Conference with a realistic assessment of what will satisfy our people and our Congress.

The administration does not wish to be in the position of misleading other countries into concluding a treaty they will expect us to ratify, a treaty which, in many respects, is believed by them to satisfy our national interests, and then find us unable to participate in the final result.

As could have been expected in the light of the U.S. position, the session in New York this spring was, relative to previous sessions, inactive. We were not in a position to negotiate on substance and, because our participation is vital to the formation of consensus, participants in the Conference were unwilling to proceed without us.

There was some activity, however, which I now briefly will summarize.

The first week of the Conference was devoted to electing a president to succeed the late Ambassador Hamilton Shirley Amerasinghe of

Sri Lanka. Ambassador Tommy Koh, of Singapore, an able and experienced diplomat, was elected to replace him.

In committee I, that is, the committee dealing with seabed mining, Chairman Paul Engo of the United Republic of the Cameroon focused attention on the draft resolution setting up the Preparatory Commission, known as the PrepCom, of the International Seabed Authority. The developing states attacked, and the developed states defended, the requirement set out in the text that the rules, regulations, and procedures adopted by the PrepCom be applied by the Seabed Authority until others are recommended to the assembly by a consensus of council members and are adopted by the assembly. Some developed countries, with the United States reserving its position at this session, have regarded this approach as essential to assuring those ratifying the treaty that the Seabed Authority would operate in a foreseeable manner.

Participation in the PrepCom, the so-called ticket of admission problem, also was debated. Those industrialized countries expressing a view preferred that signatories of the final act of the Conference be full participants in the work of the PrepCom and in its decisionmaking procedures in order to provide the broadest possible participation. The developing countries wanted membership reserved to those states which had expressed the intent to become parties to the treaty by signing it. The developing states at that point offered a "compromise" that would have allowed those states that had signed the final act of the Conference, but not the treaty itself, to participate as observers in the PrepCom's work. Other Committee I issues were treated only superficially.

The U.S. delegation confined its participation in the seabed discussions to several brief interventions reserving our position pending completion of our review.

In Committee II, which deals with navigation and coastal state jurisdiction, there were held four informal meetings without agenda to permit delegations to raise any questions deemed important to them. Some states favored requiring prior authorization or notification of warship passage in the territorial sea. Of the approximately 70 states which expressed views on the subject, roughly one-half favored the amendment and one-half opposed it. Among those favoring the amendment, a small number thought that notification, alone, might be acceptable.

Brazil argued that the text should be revised to exclude military exercises in the exclusive economic zone unless authorized by the coastal state. This proposal received support and opposition along the same lines as did that relating to warship passage.

Argentina pressed its suggestions for a change in the text to provide for cooperation among affected states for the conservation of so-called straddling stocks; that is, fish stocks found both within and without the exclusive economic zone.

Disagreement continued to be expressed as to the relative weight to be placed upon "equitable principles" and the "median or equidistance line" in the formula for delimitation of maritime boundaries of the exclusive economic zone between opposite and adjacent states.

Finally, there was some discussion concerning artificial islands.

At the conclusion of the Committee II meetings, Chairman Aguilar of Venezuela noted that while there were widely divergent views ex-

pressed, a practical consensus existed along the basic lines of the Committee II package and that there remained only a very few questions of interest to a substantial number of delegations.

As in the case of Committee I, no changes in the text emerged as a result of work regarding Committee II subjects.

Committee III, dealing with marine scientific research and pollution, met only once during the session. Chairman Yankov of Bulgaria stated that, in his view, negotiations had been completed at the ninth session and that any attempt to reopen sensitive negotiations would seriously endanger the compromises already achieved. Several delegations expressed agreement with these views. The United States reserved its position on the status of the work of the committee pending the outcome of our review. Further, the United States made clear that there also remained several minor, essentially technical, changes that needed to be discussed at some point.

The Drafting Committee did extensive work directed toward conforming and harmonizing the texts. However, a great deal of additional work confronts that committee. The committee will undertake its resumed work next month.

Finally, the Conference scheduled a 4-week session beginning August 3, as I have noted, in Geneva, with the option to extend the Conference for an additional week. Five weeks, prior to the August resumed session, will be dedicated, as I also have noted, to Drafting Committee efforts.

In closing, I would like to emphasize that it is our intention to keep members of this subcommittee and other interested Senators fully informed throughout the review policy process. We will welcome your views and you, in turn, may expect from us candid and continuous reports on our progress.

Thank you, Mr. Chairman, for giving me this opportunity to appear before you today. At this time, I would be pleased to answer any questions which you might have.

Senator PRESSLER. Thank you very much.

Former Secretary Richardson has submitted a statement. He could not be with us this morning, and, without objection, we will insert that into the record at this point.

[Secretary Richardson's prepared statement follows:]

PREPARED STATEMENT OF HON. ELLIOT L. RICHARDSON

Mr. Chairman and members of the Subcommittee, I appreciate this opportunity to comment on the pending negotiations on the Law of the Sea.

Two developments in the interval since I last appeared before you seem to me significant. The first is that the Conference as a whole has exhibited a notably tolerant understanding of the need for the United States to carry out a thorough review of the Draft Convention provided that it is done in a timely manner. There have been indications, moreover, that many delegations would be prepared to consider proposals emanating from the review that are designed to correct what we regard as flaws in the text.

Short of such a futile gesture as attempting to change the basic elements of the parallel system, how far we should attempt to go in seeking such improvements is a question of judgment. Intersessional consultations with other delegations should help to provide answers to this question. Athough the Advisory Committee on the Law of the Sea, of which I am the Public Chairman, will undoubtedly have views on these matters as well as on the substance of the changes to be sought, the Committee will not have had a chance to discuss them until it meets again on June 8–9. I shall not, therefore, try to anticipate its recommendations.

The second noteworthy development is the remarkable persistence of distortions of the Draft Convention by critics apparently less interested in getting a good treaty than in scuttling any treaty whether satisfactory or not. These distortions are now being picked up and repeated by people who are not fundamentally hostile to the treaty but who, under the impression that the text actually contains the alleged flaws, are understandably disturbed. This hearing, Mr. Chairman, affords a timely opportunity to correct the record.

The most frequently repeated misstatements, and the answers to them, are as follows:

1. That the treaty would not give the United States assured access to seabed minerals. In fact, the text expressly gives companies sponsored by a member state the right to apply for a "plan of work," spells out the qualifications of applicants in clear, objective terms, and directs the International Seabed Authority to approve a plan of work proposed by an applicant meeting the specified financial and technical standards.

2. That the United States would not be assured of a seat on the Council of the Authority although the Eastern bloc would be guaranteed three seats. Actually, the provisions for membership on the Council would assure the Western industrial countries six to nine seats; each interest group whose representation is required would designate its own representatives. The United States, either as the probable largest investor in deep-seabed mining (one of the represented interest groups) or as the largest importer or consumer of deep seabed minerals (a second interest group) would have as much practical assurance of being named to one of these groups as would the Soviet Union of being named as one of the Eastern bloc representatives.

3. The U.S. companies would be required to sell sensitive national-security-related technology. On the contrary, the U.S. Government would presumably deny an export license for any such sale. The text provides that "nothing in this Convention shall be deemed to require a State Party, in the fulfillment of its obligations under the relevant provisions of this Convention, to supply information the disclosure of which is contrary to the essential interests of its security."

4. That a company seeking an ocean-mining contract would be required to transfer its technology without adequate compensation. In fact, the technology-transfer obligation applies "only if the Enterprise finds that it is unable to obtain the same or equally efficient and useful technology on the open market" and then only on "fair and reasonable commercial terms and conditions," subject to binding commercial arbitration of any dispute as to those terms and conditions. In passing, I would note that a number of companies have already come forward to offer seabed mining systems to the future Enterprise.

5. That national liberation movements like the PLO would be eligible to share in the net revenues of the Authority. Although "activities in the area" under the jurisdiction of the Authority are to be carried out on a basis taking into consideration the interests of "peoples who have not obtained full independence or other self-governing status," the sharing of economic benefits can only be carried out in accordance with regulations in which we must concur. We shall, therefore, be in a position to prevent the PLO from being eligible.

Fortunately, Mr. Chairman, the attacks on the text have a positive aspect. They help to point up the remarkable fact that so little of this extraordinarily complex document is the subject of controversy. They also invite their own refutation by the kind of retort I have just made: namely, that the text does not say—or was not intended to say—what the critic has alleged. And where the criticism cannot wholly be disposed of by a fair reading of the existing text, it identifies an opportunity to make the language conform with its intent.

In the case, for example, of U.S. membership on the Council of the Authority, the provision for the selection by each interest-group of its own representatives was put forward by the U.S. delegation last year in the belief that this would solve the problem. It was accepted by the Group of 77 with the same understanding. Having thus in substance already acquiesced in a "guaranteed seat for the United States," it is likely that the 77 would now agree to make the guarantee more explicit.

Again, take the allegation that liberation movements like the PLO would be eligible for a share of the net revenues of the Seabed Authority. Although, as noted above, we have in fact secured effective means of preventing such an outcome, this too is a result that could be reinforced, if not in the text, at least in the official record at the final stage of the Conference.

Not all criticisms of the Draft Convention are distortions, of course. The Interdepartmental Group on the Law of the Sea had already targeted a number of needed improvements even before the review was announced. The IG proposals would have addressed most of the concerns identified by Assistant Secretary Malone when he testified on April 28 before the Subcommittee on Oceanography of the House Merchant Marine and Fisheries Committee. The most important of these proposals—and concerns—was the protection of investments made prior to the Draft Convention's entry into force. Other such matters were the transfer of technology owned by subcontractors, the "Brazil clause," the number of ratifications required for the entry into force of amendments emanating from the Review Conference, and the exemption of net importers from sharing the revenue from the exploitation of hydrocarbons in the continental shelf beyond the 200-mile limit. Although not on either Mr. Malone's or the IG's list, other desirable changes which the Conference would undoubtedly agree to put on its agenda would be a clause more positively encouraging the exploitation of seabed resources and a fixed date for the start-up of the production-ceiling formula.

Although Mr. Malone also referred to the burden imposed on seabed-mining corporations by the Convention's revenue-sharing provisions, this is a concern which should, in all fairness, be dealt with under domestic law. All that is necessary is to give revenue-sharing payments to the Authority the same treatment as taxes paid to a foreign government. Indeed, this has all along been advocated by the State Department. If this were done, the present text is likely to be acceptable to U.S. mining companies.

In conclusion, Mr. Chairman, I want once again to emphasize that the treaty, as thus improved, would bring substantial benefits to the United States. This is widely acknowledged in the case of freedom of navigation and overflight, environmental protection, conservation of living resources including marine mammals, oil and gas exploitation, telecommunications, conflict prevention, and dispute settlement. Most members of the scientific community agree that marine scientific research would be better off under the treaty than without it. And even the seabed mining industry recognizes that a treaty improved in realistically possible ways is the preferable means of obtaining rights good against all the world to carry our deep seabed mining operations in defined areas of the ocean bottom. Such a treaty would, therefore, better serve the national interest in access to strategic minerals than a vulnerable reciprocal regime to which only a handful of industrial countries belonged.

Thank you, Mr. Chairman and members of the Committee. This concludes my prepared statement. I would be glad to respond to your questions.

Senator PRESSLER. I do have several questions, but I see that our chairman and ranking member have arrived. I shall yield to each of them.

Senator Percy.

The CHAIRMAN. Thank you, Senator Pressler. We appreciate very much your chairing this very important hearing this morning.

This is the first opportunity we have had to have Secretary Malone appear before the Foreign Relations Committee after his confirmation hearing. Despite the very lengthy deliberations on your nomination in the committee, Mr. Malone, I supported you throughout and was pleased to do so. I was delighted that the Senate unanimously approved your nomination. This is something no Senator can say about his or her own election.

We look forward to working with you on the vital issue of Law of the Sea, and also on nonproliferation matters and other responsibilities under your bureau.

I believe the administration was correct to take a new look at the entire negotiation. I think those of our friends and allies and those other countries that have negotiated for such a long period of time on this treaty would have to recognize, as I do in my own judgment, that the draft treaty, as it stood, good as it was in many respects and though it achieved remarkable things in certain areas, probably could

not have gained the full two-thirds support of the Senate that is necessary for its ratification.

The Reagan administration, in a sense, is just being realistic anticipating, with the new chance that it has, putting together a treaty that could gain a two-thirds vote of the Senate. I have no doubt that the Reagan administration, if it successfully concludes negotiations, can assure the world that two-thirds approval of the Senate could be obtained.

I think it is very similar to the case of SALT II. If we negotiate a new SALT treaty with the Soviets, I gave them direct assurance that if the Reagan administration negotiated and fully supported it, we could approve it. I feel the same about this treaty.

However, I am concerned that we may take too long to arrive at our negotiating position. I have received indications from several of our close allies that if we do take too long to conduct our internal review, the opportunity for achieving necessary changes in the treaty will be lost.

I certainly look forward, therefore, to your comments on how long it would take and why.

At this point, Mr. Chairman, I would yield to Senator Pell for whatever opening comment he would care to make.

Thank you.

Senator PRESSLER. Senator Pell.

Senator PELL. Thank you, Mr. Chairman.

Today the Subcommittee on Arms Control, Oceans, International Operations and Environment is holding its second oversight hearing of the year on the status of the Law of the Sea negotiations, a reflection of the importance which this committee accords to Law of the Sea.

I would like to congratulate Senator Pressler, chairman of this subcommittee, for his careful scrutiny of this issue and to thank him for calling these hearings today. The last hearing by this committee, over 3 months ago, followed by only a few days the U.S. decision not to participate actively in the Tenth Session of the Law of the Sea Conference. The administration made this decision because it had not had sufficient time to undertake an extensive review of the current draft text of the Law of the Sea Conference. Any negotiations, pending such a review, the administration held to be impossible.

While in my view the timing and handling of this announcement could have been much better orchestrated, nevertheless I do support the prerogative of any new administration to be able to conduct a thorough review of all policy issues prior to conducting negotiations or making decisions.

However, it is my hope this review will be conducted in an expeditious way in order to minimize the disruption of the momentum of the ongoing negotiations, lest hard-won concessions in the current text which are in the national and foreign policy interests of the United States be reopened in the negotiation and possibly lost.

In this regard, I am particularly anxious to hear from Mr. Malone on the progress being made in the current inter-agency review of the Law of the Sea text, the timetable for the completion of that review, and the likelihood that the United States will be prepared to discuss

in detail any and all issues which arise during the summer session of the Law of the Sea Conference scheduled to convene August 3.

I would like to note for the record the membership of the Senate Advisory Committee for the Law of the Sea, which was appointed by the leadership of the Senate. In addition to those of us who are here at this table, Senators Tower, Packwood, Dole, Stevens, Gorton, Hollings, Johnston, and Cranston all were appointed to it.

I would hope that the administration would consult regularly in the course of its review with members of the advisory committee as well as with members of this committee. In a more personal vein, I having worked on this project for more than a dozen years, and have observed the long process involved in getting negotiations started. I have seen the concessions that were made during the negotiations early on in many areas, and which were in the U.S. interest and taking note of momentum that was acquired, I think that it would be very disastrous now for American national interest to lose completely that momentum and bring the negotiations to a dead stop. The world agreement could then unravel and then we would be faced with a deteriorating situation internationally. We might even perhaps eventually find ourselves with a terrible world map of the oceans, which some of us have seen, which shows the oceans divided up the way Africa was divided up by the colonial powers not so many years ago.

So, Mr. Malone, I would hope, being the sensible and thoughtful man that you are, as you approach this problem you will do your best to get the show on the road.

Mr. MALONE. If I might be permitted to respond for a moment, Mr. Chairman. I want to express my very great gratitude first to both Senator Percy and Senator Pell for their support of me during the confirmation process, and indeed, for your support, Mr. Chairman. I am extremely gratified by that.

I would like to comment with regard to Senator Pell's remark about moving ahead on the review process. We are attempting to move ahead very rapidly. We have the matter well underway.

I believe all of the members of the committee have just received, or shortly will be receiving, some of the major papers that are being prepared in that process, one on the structure of our review, another on U.S. Law of the Sea objectives, and a third on the interests which are of concern to us.

We will be looking at those with you. Some are classified materials, which we would have to discuss with you in executive session. I also intend to consult with others in the Congress.

Initial reactions to our decision to withdraw from substantive negotiations at UNCLOS III until the completion of a thorough policy review were, quite naturally, negative. The impression had been widespread that negotiations along the lines of the draft convention on the Law of the Sea—informal text—could be completed at the March–April session, or nearly completed at least.

After the U.S. delegation explained the reasons for our decision, and enough time had passed for initial reactions to be replaced by considered opinions, the positions of many delegations began to change. Given that the Senate would likely not give its advice and consent to a treaty text similar to the draft convention, and that no comprehen-

sive treaty without the United States' participation could be successful, other governments realized that the only possible route to success for the Conference runs through a thorough and unbiased U.S. policy review. Positions of foreign governments cause a spectrum, of course, with some more enthusiastic than others. The Federal Republic of Germany has been the most supportive, noting that many of the concerns we are now pointing to have been raised for years by the German Delegation, but went unheeded. The Japanese, French, and British have also indicated that they will assist us in preventing formalization of the text or the insertion of amendments calculated to harm U.S. interests. The Soviet Union also indicated a willingness to help "keep the lid on" the August session, though they are themselves quite content with the current text.

Representatives of developing countries, expecially the Conference leadership such as President Koh of Singapore and Chairman of the First Committee Engo of Cameroon, have also indicated a desire to prevent rash actions by the Group of 77 at the August session. They have noted, however, that their ability to keep the Conference from getting out of control depends to a great extent on the nature of the position taken by the United States and the manner in which our position is presented.

At the same time, we are attempting to move forward as rapidly as we can with the concerned constituencies in the private sector, and also to conduct our consultations with other countries.

Indeed, this month I will be conducting consultations with the Western Group of Nations in Bonn, to be followed by further consultations in Moscow. I already have had consultations with the Brazilians and the Argentinians, and we are moving through this aspect of the process as fast as we can.

We think this is absolutely essential to our review process and to assessing what our position should be.

We do not believe that the process will be fully completed by the August session. Indeed, we would expect to utilize that session as an opportunity to discuss with the other delegations our tentative conclusions, and we will have a good many by that time, and to elicit responses.

We would expect that, upon the conclusion of the August session, we will have a thoroughly formulated position concerning the draft convention. We think this is not only in our national interest, that is, to be very careful, thorough, and deliberate in doing it in this way, but also that it will be in the interest of all of the countries concerned.

We do not want to proceed too far with matters until we are certain that we have a text behind which we can stand, which will be acceptable to the Congress of the United States, and which will be ratifiable. I do not think, as Senator Percy has observed, that we have such a text now. We want to be sure that we do have one before we move to finalization.

I would certainly think that the review will be fully completed by the time we have reached the fall.

Thank you, Mr. Chairman.

Senator PRESSLER. I have a few questions. I will ask two or three questions and then will defer to my colleagues for questions, since

they also have busy schedules. Then, when they have finished, I may have additional questions, if that is agreeable.

Mr. Malone, I noted that in your statement you stated that one of the problems is that the draft convention contains provisions concerning liberation movements, like the PLO, and their eligibility to obtain a share of the revenues of the Seabed Authority.

In Mr. Richardson's written testimony, which he submitted for the record, he refutes this. He lists several myths, as he calls them, about the treaty. His fifth myth is that national liberation movements, like the PLO, would be eligible to share in the net revenues of the Authority. He states that as a misunderstanding about the treaty. He says:

> Although "activities in the area" under the jurisdiction of the Authority are to be carried out on a basis taking into consideration the interests of "peoples who have not obtained full independence or other self-governing status," the sharing of economic benefits can only be carried out in accordance with regulations in which we must concur. We shall, therefore, be in a position to prevent the PLO from being eligible.

Would that not answer the concerns that you expressed?

Mr. MALONE. Well, Mr. Chairman, it is true that the United States could block distributions of revenues to terrorist organizations and could take other steps in this regard if the United States has a seat on the Council. But, as I mentioned in my statement, it is by no means guaranteed that the United States will have a seat on the Council.

I think, however, beyond this, that the PLO clause raises a very fundamental question. We have taken a position, in general, that we have been against even observer status for national liberation movements. On principle and policy grounds we have opposed this. Here we have a situation in which such liberation movements could potentially play an even larger role, and we think that the matter is not adequately addressed at the present time.

Therefore, I would differ with the conclusions in this connection made by Ambassador Richardson.

Senator PRESSLER. On that point, you also mention that the draft convention creates a one-nation one-vote international organization. You state:

> In the Council, the Soviet Union and its allies have three guaranteed seats, but the United States must compete with its allies for any representation. The Assembly is characterized as the "supreme" organ and the specific policy decisions of the Council must conform to the general policies of the Assembly.

Secretary Richardson rebuts that argument to some extent by saying:

> Actually, the provisions for membership on the Council would assure the Western industrial countries six to nine seats; each interest group whose representation is required would designate its own representatives. The United States, either as the probable largest investor in deep seabed mining (one of the represented interest groups) or as the largest importer or consumer of deep seabed minerals (a second interest group) would have as much practical assurance of being named to one of these groups as would the Soviet Union of being named as one of the Eastern bloc representatives.

Now I do not want to make this a debate between you and Mr. Richardson because I am sure neither of you would approve of that. But his testimony is arranged in such a fashion, listing these points, that your two papers almost naturally become a debate.

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What is your response to his analysis?

Mr. MALONE. Mr. Chairman, I think this is a very important issue that is raised by Ambassador Richardson. I would like to be quite specific in my response to it, and I hope that you will permit me to take 2 or 3 minutes to read to you and the subcommittee members a response which I think covers it.

As I mentioned in the statement, the United States is not assured of a seat on the Council.

Article 161 establishes two special interest categories for which the United States could qualify: First, seabed mining nations: and, second, consumer or net importer nations.

Of the eight seats in these two groups, two are expressly reserved for the Eastern European bloc, leaving six to be apportioned among other seabed mining and consumer nations. Seven countries—the United States, Japan, the United Kingdom, France, Belgium, the Netherlands, Italy, and the Federal Republic of Germany—have active seabed mining firms. These nations are all major consumers of metals. In addition, other Western industrialized countries, such as the Scandinavians, have stated publicly their desire to be represented in these groups.

All of these countries feel that they need to be represented on the Council to protect their interests. The United States cannot expect other mining nations or consuming nations to foresake their need to be on the Council to protect their interests by putting the United States on the Coun il in place of themselves.

So, we have a competition that exists here which could very well affect whether or not under these categories we would be eligible for a seat.

Likewise, the group to be selected on the basis of geographical distribution, which is another criterion for selection, provides no assurance for a U.S. seat. Geographical distribution is to be balanced among the five regional groups across the entire 36 members of the Council. This means that no one could have more than seven, or at most eight, members. The Western European and Others group, to which the United States is assigned, already is likely to be represented by seven or eight members in the seabed, mining, consumer, and exporter categories. This means that the Western European and Others group will have only one seat in the category selected on the basis of geographical distribution. The various interests of the members of the Western European and Others group is likely to cause fierce competition for this seat, again, under the geographical distribution criteria.

Even if the United States obtains an initial seat on the Council, however, we are likely to be rotated off that body. This is provided for in article 161(4). At the same time, the Soviet Union clearly is guaranteed a seat and may select from a number of categories the one in which it most desires to be represented.

As I have noted, the East European socialist bloc is guaranteed seats in the seabed mining and consumer importer groups. This is provided by article 161(1)(a)(b), and one seat on the basis of geographical distribution. The bloc may also have a seat in the net importer category—indeed, Romania is an LDC and may participate as such on the Council.

The tight discipline that the Soviets exercise over votes of the Eastern European countries in international organizations of course is well known to us all. Therefore, the Soviet Union not only is assured of a seat on the Council, but also of controlling at least three to seven votes. So, we are indeed in a situation where the Soviets are guaranteed a seat and it is problematical as to whether we will have a seat or not.

We certainly are not excluded from a seat, but we must compete for that seat, and it is not assured that we would receive such a seat.

Senator PRESSLER. So, in other words, our allies would have to see to it that their own interest would be served if the United States is assured of membership. We would not be guaranteed membership under the draft treaty. There has been a kind of unwritten law in all U.N. organizations that the United States receive a seat in the principal decisionmaking bodies. But your point, then, is that we are not guaranteed that as the Soviets are.

Let me ask one more question.

Mr. MALONE. Mr. Chairman, before you proceed, may I respond to that point?

Senator PRESSLER. Yes.

Mr. MALONE. Indeed, it may not be perceived to be in the interest of the other Western nations, as I have just noted, to insure that the United States have a seat. They may think it more important for themselves to have a seat, rather than the United States. So there could be a very fierce competition there and their interests may be going in a different direction from ours and they may not support us for such a seat.

Senator PRESSLER. That is one thing the review may very well recommend be changed.

Mr. MALONE. Indeed, we are very, very carefully looking at that problem.

I would underscore, in this connection, that we have flagged this as a problem. We have not come to any conclusion about any of these areas. But I think you can see by my rather lengthy response, that it is a very grave problem.

Senator PRESSLER. I shall ask one more question and then will yield to my colleagues before asking further questions.

On your statements regarding the transfer of technology, again, Secretary Richardson in his third point says, "On the contrary, the U.S. Government would presumably deny an export license for any such sale." He says it is a myth that the United States would be required to sell sensitive national security related technology. He states:

> The text provides that "nothing in this Convention shall be deemed to require a State Party, in the fulfillment of its obligations under the relevant provisions of this Convention, to supply information the disclosure of which is contrary to the essential interests of its security."

Also he goes on to say it is a myth "that a company seeking an ocean-mining contract would be required to transfer its technology without adequate compensation." He says this is not true because—

> In fact, the technology-transfer obligation applies "only if the Enterprise finds that it is unable to obtain the same or equally efficient and useful technology on the open market" and then only on "fair and reasonable commercial terms and conditions," subject to binding commercial arbitration of any dispute as to those

terms and conditions. In passing, I would note that a number of companies have already come forward to offer seabed mining systems to the future Enterprise.

Again, we seem to have a conflict in interpretation—or, maybe we don't?

Mr. MALONE. Again, Mr. Chairman, I would like to be very specific in my response to Ambassador Richardson's point.

I believe it is highly questionable that article 302, which is the applicable article here, would provide protection, as Ambassador Richardson alleges, against the forced sale of security-sensitive technology. That is the first part.

In annex II, article 5, there is a prohibition of a mining company from using technology in its own operation that it is not legally entitled to transfer. Thus, the United States could be put into the position of having to decide whether to permit the transfer of certain security-sensitive technology or put its seabed mining industry out of business.

Moreover, I would add, article 302 deals only with technology that is "essential" to security interests. We simply do not know how that is defined. There is no definition in article 302.

With reference to the adequacy of compensation for the transfer, the terminology that is used sounds very good. It says "fair and reasonable commercial terms and conditions." But we have no definition, once again.

Senator PRESSLER. Mr. Malone, may I interrupt you just for a minute. Senator Percy has to leave to go to another committee hearing and I would turn to him for his questions now.

The CHAIRMAN. Thank you, Mr. Chairman.

Unfortunately, Bob Strauss is waiting for me to arrive before he testifies on trade, so I should leave right away.

I wonder if you have seen the article in the "Chicago Tribune," "Will Reagan sink sea treaty?"

Mr. MALONE. Yes; I have looked at it very briefly, Senator Percy.

The CHAIRMAN. It's a rough piece and it certainly gets your attention.

I will insert it into the record at this point.

[The article referred to follows:]

[From the Chicago Tribune, May 25, 1981]

WILL REAGAN SINK SEA TREATY?

(By Michael Kilian)

NEW YORK.—If the Reagan administration would like the rest of the world to view it as something other than a shill for the likes of Kennecott Copper, Lockheed, United States Steel, and Sun Oil, it has until August to prove it.

That is when the 158 members of the Law of the Sea Conference—more countries than belong to the United Nations itself—will meet in Geneva in a last attempt to bring about what is perhaps the most important diplomatic accord in the history of governments:

A treaty that would place the seas and oceans—70 per cent of the earth's surface—under the rule of law to assure its peaceful and equitable exploitation.

Final agreement was supposed to have been reached at the conference session just concluded at United Nations headquarters in New York. Preliminary talks on this topic began in 1958 and the current round of deliberations has been under way since 1973.

Working through consensus, the 158 nations had painstakingly put together a 180-page text of the treaty which lacked agreement on only a handful of eminently negotiable issues. According to Elliot Richardson, until recently the head of our

Law of the Sea delegation, nearly everything the United States sought in the treaty had been achieved and an acceptable compromise on the few remaining items was at hand.

Then last March, in a diplomatic "night of the long knives," the Reagan administration brought the entire process to a jarring halt. Without consulting or even notifying our allies, the White House abruptly sacked the State Department officials in charge of our Law of the Sea delegation and ordered their replacements to prevent final agreement from being reached at the March and April spring session. Despite eight years of work and achievement involving two Republican administrations and one Democratic one, the United States suddenly wanted to review the entire treaty, with particular attention to how it would affect American companies involved in deep-seabed mining projects.

From the point of view of stockholder interested solely in maximum profit, Kennecott, U.S. Steel and the other American mining companies have reason to be unhappy. Under the treaty, efforts to mine the more than $1.5 trillion in precious metals obtainable from the ocean floor would be licensed and regulated by an international authority whose governing body would include many Third World and communist bloc nations. A tax would be exacted in that the governing body would undertake mining operations itself on behalf of geographically disadvantaged and underdeveloped member nations. As a newspaper columnist friendly to the mining companies complained: "It destroys the idea of private property and the incentive to risk money."

As the mining companies have made clear through their many lobbyists, they do not want to be hampered in any way, whatever the effect on the treaty. As several Western ambassadors here unhappily agreed, no United States cooperation would mean no treaty at all.

And there's the rub. Are the best interests of the mining companies synonymous with those of the entire United States?

Kennecott, for one, seems to survive nicely being licensed, regulated, and taxed by the state of Colorado without having its private property rights "destroyed."

But central to the Law of the Sea issue is the almost universally held view that the world's oceans are not the private property of Kennecott or the United States.

All the participants in the Law of the Sea Conference, including the United States, in 1970 swore fealty to the proposition that the sea is "the common heritage of mankind," to be used and shared equitably by all—not simply the heritage of those nations with the biggest gunboats. With 1,000 ships to our 435 or so, the Soviet Union happens to own the "biggest gunboat" title at the moment.

The treaty deliberations, which saw the Soviet Union opposed by such nominal allies as Cuba on many issues, succeeded because every country was willing to give up something to achieve the whole.

Among the things we would gain from the treaty would be the right to conduct our deep seabed mining operations without fear from harassment or worse from those many nations which do not believe that the oceans are the private property of Kennecott.

The treaty would require the other nations to ascribe to the same pollution control standards we do—as they now demonstrably do not. It would establish a mechanism for the arbitration of disputes, and for the quick release of any of our vessels caught up in such disputes.

It would set forth coherent boundaries for economic zones and establish a legal definition of the continental shelf. We and Mexico, for example, would at last have a clear idea of who owned what in the Gulf of Mexico. We could negotiate our fishing disputes with Canada and other nations from a fixed, mutually-agreed-upon point of reference.

And the limit for sovereign seas would be set at 12 miles for everyone. Some nations are now claiming 200 miles or more.

The treaty would guarantee something that our woefully understrength Navy cannot: the right of peaceful passage upon, over, and beneath the waters of the key straits of Gilbraltar, Hormuz, Malacca, and other vital bottlenecks. The treaty is worth its weight in billions from a military standpoint alone.

The other conference participants greeted the Reagan administration's action with dismay. "Unnecessary, shortsighted . . . potentially chaotic" were words the London Times used. "Catastrophic repercussions" was one leading German response.

President Reagan says he believes in linkage. He is asking our NATO allies to accept more nuclear warheads (when our own Utah and Nevada will not). According to Icelandic Ambassador Hans Anderson, "All of Europe wants this treaty very much."

"I am very worried," said Conference President Tommy Koh of Singapore. The same fear was echoed by all the other diplomats interviewed. In this matter of profound global import, they had thought they were dealing with a sovereign nation that constituted the world's largest representative democracy—not just the boards of directors of a few corporations.

The CHAIRMAN. It does point out many of the advantages of the present treaty. It also points out in one paragraph:

The other conference participants greeted the Reagan administration's action with dismay. "Unnecessary, short-sighted * * * potentially chaotic" were words the London Times used. "Catastrophic repercussions" was one leading German response.

Have we had any official or informal contacts or comments made to us by some of our allies, such as the United Kingdom, West Germany, Canada, or Australia, following the announcement that our review will not be completed by this summer?

Mr. MALONE. Yes; we have, Senator Percy. There has been a variety of views among our Western allies in terms of our review.

These have ranged—and I will not specifically characterize them country-by-country—from reactions rather critical to really very, very supportive.

However, in no instance in the Western Alliance group has there been a challenge to our right to conduct such a review. Some have expressed concern that we move as rapidly as possible. We certainly are doing that. Some have expressed concern that we not unduly damage the chances of securing a treaty. Certainly that is not our intention.

So, there has been a range of reaction. I don't think, in any case, however, that I would have characterized it as vigorously as the author of that particular article did.

The CHAIRMAN. Well, I know Michael Kilian, who wrote the article, and he does get your attention. [General laughter.]

I think that was his purpose in the article.

How realistic is the concern that has been expressed by some observers that the Conference actually could begin voting on the draft treaty at its forthcoming summer session?

What other concerns do you have about the summer session?

Mr. MALONE. I think, with regard to the possibility of voting, that there is a modest risk there. I think it is a very, very remote risk.

I think the members of this Conference desire the United States to be a participant in this treaty, and they are going to try to accommodate us in doing so.

If there were an attempt to move from consensus, which is the way the Conference has proceeded, to a two-thirds vote to override us, or roll us, as it were, in the Conference, that then, would have very, very serious implications.

We have made it clear that we must have a treaty, before we can finalize it, which will be acceptable to our Congress. I believe there is a very low risk that they are going to attempt to override us in the August session. But, as I said, Senator Percy, I cannot tell you that there is no risk at all. But I think it is a very, very remote one.

I think most of the countries feel that it is almost essential to have the United States a participant to have this Law of the Sea Treaty really be an effective one, and that they are going to try to give us as much leeway as they can.

I might just add on that point, stemming from some of my recent consultations with members of the Group of 77, that there is, indeed, an inclination to give us the time and flexibility to move this thing ahead; they do not intend to come down too vigorously at the August session. Obviously, they want to see movement. We certainly are going to try to be moving in that direction.

The second part of your question involves the other matters of concern that I see at the August session. These really are related to what I mentioned before. I want to have the opportunity of reviewing with the Conference participants where we are at that point in a very meaningful way. I think, if we can achieve that effectively there, in addition to what we have done before we get to the August session, that we can complete our review and be fully ready to go, after the August session. That is the way I would see it.

The CHAIRMAN. Will you be in Geneva yourself? Will you be heading the delegation?

Mr. MALONE. I will be heading the delegation. I plan to be in Geneva myself; yes.

The CHAIRMAN. Will you be there for the entire session?

Mr. MALONE. Yes.

The CHAIRMAN. I would suggest that you take along with you a copy of the testimony given by a very distinguished lawyer who spoke about the treaty powers of the Senate. These are not well understood, even by some of our closest allies. They are not well understood by most Americans and even some Members of the Congress, and certainly the executive branch.

Jock MacCloy, whose reputation as an international lawyer is beyond reproach, really made a thorough analysis and study of this subject, beginning with the Founding Fathers. It is the best discussion I have seen.

He tried to explain what the powers of the Senate were. He said originally the Founding Fathers wanted all the power of treaty making in the Senate and they wanted Senators to do the negotiating. But they ran into problems with that. So they finally decided to have the President, in a sense, act as the agent of the Senate and do the negotiating, but gave the Senate the power to approve the treaty.

I had never heard that theory before. He was very convincing in his testimony during the SALT II hearings. I think it caused many of us to feel that we had to take a much greater burden of the responsibility for the treaty, to be certain that we did have something that could get through.

We have here two experts on this subject today. Senator Pell has had a long association with Law of the Sea. When I was ranking member and he was chairman of this subcommittee we equally divided the world. He took 3-fourths of it, all of it under water, and I took the nonproliferation end which was essentially on land.

Senator Pressler, too, really has put much time and thought into this. I would strongly recommend that we all be kept very closely up to date and that we work in partnership with the delegation. We do have the job, and it does no good to conclude a treaty that just is not ratifiable.

I would hope that in Geneva you could help explain to our friends how the treaty-making process works in the United States, under the

Constitution, and why it is so important that these considerations be taken into account.

I want to give you the opportunity to answer my next question on the record. It relates to some of the concerns of some of our allies and the very many countries with which we will be negotiating. Just how many countries are there—158, something like that? Is the group larger than the United Nations?

Mr. MALONE. Yes, it is about 160.

The CHAIRMAN. That's quite a number.

Well, there have been some concerns that we might really be turning very cold on the whole idea and not participate.

Is complete withdrawal from the Law of the Sea negotiations a possible option for the Unitet States? If so, what would we do in that event to preserve our interests in navigational freedoms and access to seabed minerals and to preserve all the other things which Mike Kilian points out are real assets to the United States of America in this treaty, as negotiated up to this point?

Mr. MALONE. Senator Percy, in our review process, we are considering a range of options. We feel that we must do that in terms of assuring that our national interests are adequately assessed and protected. A possibility under consideration would be such a withdrawal.

However, I hasten to point out that no conclusion has been drawn on this. This merely is an option that is being considered amongst many in this review.

I think there are people who have characterized the review as having come down on such an option. I categorically deny that this is the case.

Hypothetically, were it deemed in the best national interest to move in the no-treaty direction, obviously we would have to undertake certain steps to preserve our position, as far as navigation rights are concerned, deep sea mining interests, and other interests. Just exactly what those would be, again, is under review. There have been no final conclusions drawn on that.

This is something that we feel has to be considered because, as we stated when we undertook the review, it is a very thorough, complete, and fundamental review in which we are looking at all of the options.

So, the bottom line that I would like to leave with you is this: It is an option being considered, it is something on which no judgment has been taken at this time.

The CHAIRMAN. Thank you.

Mr. Chairman, because Senator Pell is here today, I would like to ask one other question of the Secretary involving our overall committee responsibility.

Mr. Malone, there was some doubt as to when you would be sworn in. As I understand it, you were finally sworn in on Monday.

Mr. MALONE. Correct.

The CHAIRMAN. You are in a position to know what it is like to have a Department that has nominees pending, people who are working but not yet confirmed. Really, until such time as you are confirmed, you have at best a quasi-official status.

This committee reported out on May 6 and 7, Assistant Secretaries Crocker and Rashish.

Mr. MALONE. Yes, sir.

The CHAIRMAN. But these men have not yet been acted on by the Senate. We really have spun our wheels to move forward. I sat here day after day when other Senators were in recess, holding hearings so that we could push nominations forward, and they are still on hold.

As I understand it, all the administration has to do is officially advise the Senate majority leader that it wants those nominations moved.

What is happening to morale? What happens when you have a suspended nomination, as we do? We have acted as a committee and have reported both men out favorably.

As chairman of this committee, I am concerned, as I am sure Senator Pell, as the ranking member and the only former Foreign Service Officer who has served on this committee, is concerned that we are not putting a team in place fast enough. Well, we just can't move any faster than we have already moved, with 40 nominations so far. We have had no holdup by any committee member in this committee. Nominations have been moved ahead, though they are held up on the floor.

I think it would just take an urgent call from the administration, possibly a telephone call from the President—if it makes any difference.

Does it make any difference whether they are voted on by the Senate or not?

Mr. MALONE. It certainly does, Mr. Chairman. While I will not try to address the details of those cases, I certainly can say as a general matter that being in a state of limbo, as it were, does make the performance of your responsibilities considerably more difficult.

I recognize that the committee has done a very, very fine job in moving forward with reporting out these nominations, and it is certainly my hope, and indeed to the extent that I have an input into it my desire to see the matter moved to the floor and be acted upon by the full Senate just as rapidly as possible.

I certainly will make that recommendation to the proper places.

The CHAIRMAN. You can carry forward the assurance from the chairman—I will just speak for myself—that there is no question they will be overwhelmingly supported by the whole Senate. There is no question whatsoever about this. Nothing further needs to be done of any kind. They have been reported out favorably overwhelmingly by this committee.

I think, frankly, it is a very destructive thing for morale in the Department to feel that there can be such a long delay, particularly after the committee itself has acted. There is no reason why they should not be voted on up or down. Any Senator who wants to cast a negative vote can do so. But I don't think many will. In these cases I think the people are eminently well qualified and they ought to be put into place. The team should be gotten underway.

We still have a long way to go, of course. There are a lot of ambassadorial appointments that have not yet come forward. I would like to see the whole process move. The Reagan team ought to be in place in the State Department. It is a very important matter, in every single job and every single country.

We want to cooperate to the maximum extent. But it does no good for us to be holding night sessions and sessions during recess and

then have the nominations just sit around, especially when all it takes is a phone call; it's your move.

Mr. MALONE. I would agree, Senator, that we need to get the team in place.

The CHAIRMAN. Thank you very much.

Thank you, Mr. Chairman.

Senator PRESSLER. Thank you.

Senator Pell.

Senator PELL. Senator Pressler, you were in the middle of an answer to your question, so I would wait for the completed reply.

But first I would endorse fully what our chairman has said. However, I don't have quite as much leverage as Senator Percy does in pushing ahead.

Senator PRESSLER. Mr. Chairman, before you leave I want to say that I have a constitutional amendment to move up the swearing-in time of the President and I am going to send it to your Government Operations Committee. I suggest moving it up to late November and urge studies to find ways to get appointments done faster. This is my first time through, but it is 8 months since the administration was elected and we are still holding hearings on the Assistant Secretary over in the Commerce Committee. We have to find some way to speed up getting nominees before us.

The CHAIRMAN. It always has been a source of amazement to me that at No. 10 Downing Street, just as the last vote comes in, the moving trucks arrive at that address; out goes one Prime Minister and in comes the other.

Senator PELL. If the Senator would yield at that point, Senator Byrd of Virinia and I introduced on February 5, a Senate joint resolution, which proposes a constitutional amendment to provide for the swearing in of the President to occur on November 20 following election day. I would hope we could get hearings on this and could move in that direction.

Senator PRESSLER. Mr. Malone, you were in the middle of an answer which Senator Pell has suggested we continue. It concerned the transfer of technology and the companies that have come forward to offer seabed mining systems. We will patch your answer now up with your previous answer.

Do you think you can remember where you were proceeding at full cry when you were interrupted?

Mr. MALONE. I believe, Mr. Chairman, that I was addressing the adequacy of compensation in the mandatory technology transfer. I had observed that, although there is a certain ring of nicety to the term that is used, "fair and reasonable commercial terms and conditions" this apparently is not defined in any legal system. We don't know just what we are dealing with there in terms of using that as a criterion for adequate compensation.

So, when we would get to a case that would go to arbitration, the arbitrators could largely pour their own wine into this vessel in defining such terms. We might get a very different definition from a Soviet or other Eastern bloc member of an arbitration panel than we would from a Western European or U.S. member.

So, there is a very high degree of uncertainty that is involved in calculating the adequacy of compensation.

I also might observe that much of this technology is site-specific technology. It is not really transferable from one site to another, which makes the determination even more difficult.

Then, of course, there are problems in that much of the technology is not owned by the mining companies themselves, but by the suppliers and subcontractors to the mining companies, which would cause a real problem there.

In other words, at the bottom line, what you still basically have is a forced sale. A forced sale is just not consonant with a supposed sale on commercial terms. For the reasons that I have just expressed here, I think Ambassador Richardson's response about the assurance of the adequacy of compensation therefore is somewhat questionable.

Senator PRESSLER. Is the possibility of proposing a mini-treaty among the great maritime powers a real one? If, for example, you feel that the treaty in its present form is not acceptable, would it be in our national interest to propose some sort of mini-treaty that would be among the five or eight major powers that could mine the seabeds and carry on such activities? There are probably now only a dozen countries in the world that have the technology and the wealth to carry out this activity.

What about that possibility?

Mr. MALONE. Well, Mr. Chairman, we have deep seabed, hard minerals legislation on the books, as you are well aware, mandating that we undertake certain action. In furtherance of that, we are presently pursuing reciprocating States discussions amongst like-minded States that either have now or may have not only the capability, but also the legislation, to undertake deep seabed mining.

This is something that is on a completely separate track from the Law of the Sea. It moves from the legislation we have on the books, but, of course, is considered by our mining interests as being absolutely essential to their carrying on exploration and ultimate exploitation on a commercial basis.

We are looking only at the reciprocating States matter at the present time. We are not relating that to the Law of the Sea in a directly linked or connected way.

We are not now looking at a mini-treaty solution. This might be an option that will be considered in the review, but we have not gotten to that point. The reciprocating States is the only matter that is now under consideration and this is moving ahead in due course.

Senator PRESSLER. The current Law of the Sea text provides for revenue sharing related to the revenues which may be derived from petroleum activity on the continental shelf, where the shelf extends seaward for 200 miles, as I understand it. Some companies have suggested that the level of revenue sharing or royalty paid to the international body created by the treaty would be too high, and would have the effect of deterring companies from developing an otherwise attractive area, given the high cost of working in these waters. The United States clearly needs to develop all of its domestic energy potential and to do this in an efficient manner to reduce our import dependency for the future.

Can we afford a royalty which is, in effect, probably a disincentive to domestic resource development?

Mr. MALONE. Well, we are analyzing this matter in the review, Mr. Chairman. This certainly could be a disincentive.

There is an escalating royalty, as you know, that goes up to 7 percent, in terms of wellhead value after 12 years. It could amount to a very substantial amount of money, and it is something that we are very intensively looking at in the review process.

Apropos of this same matter, as I mentioned in my statement, the developing countries that are net importers of hydrocarbons are exempt from the obligation. I think this ought to be taken into consideration as well.

Senator PRESSLER. So we probably would be exempt, then?

Mr. MALONE. No; we are a developed country.

Senator PRESSLER. Oh, you did say it was for developing countries.

Mr. MALONE. This is for developing countries that are net importers.

Senator PRESSLER. It has been suggested a number of times that the future of the resources offshore the Antarctic will be determined by the Law of the Sea Conference if the past course of development of international law continues without some redirection.

First, is it true that the international seabed area, as defined in the current draft treaty, would include the entire Antarctic shelf, up to the edge of the permanent ice mass? Second, if so, how does this relate to the United States continuing negotiation with the present Antarctic treaty parties on the future of the resources of the Antarctic?

Third, will the Law of the Sea Conference overtake the Antarctic negotiations and preclude development of a different, perhaps better, resource regime for the Antarctic shelf?

Perhaps you would prefer to respond to that in writing?

Mr. MALONE. I think I would make just a very quick response and then submit something in writing for the record since that is a rather long question.

With regard to the first part of the question, we are concerned about this and are looking at it very, very closely. There could be a very real problem here, and I would like to expand upon that in a separate written response, if I may, Mr. Chairman.

Senator PRESSLER. All right.

[The information referred to follows:]

ANTARCTICA

[SUBMITTED BY THE DEPARTMENT OF STATE]

I would like to respond to your three questions with one general answer. Article 1 of the Draft Convention on the Law of the Sea (Informal Text) defines the "Area" as the seabed and ocean floor and subsoil thereof beyond the limits of national jurisdiction. The United States, of course, does not recognize claims to territorial sovereignty in Antarctica, and under the Antarctic Treaty does not claim territorial sovereignty in Antarctica. Thus, on its face, a problem might arise in regard to the relationship between a Draft Law of the Sea Convention and our Antarctic position. However, since there is no consensus that Antarctica and its Offshore area is beyond the limits of national jurisdiction we do not believe that the "Area" of the Draft Convention on the Law of the Sea can properly be said to include the physical continental shelf off Antarctica. As I mentioned, there is no consensus that Antarctica is beyond the limits of national jurisdiction. The United States views this from two perspectives. First while the United States does not recognize territorial sovereignty in Antarctica, the U.S. actively participates in the Antarctic Treaty which expressly does not prejudice the claims to territorial sovereignty made by seven states prior to the Treaty's entry into force.

Second, the United States has and maintains a basis to a claim of sovereignty in Antarctica and this basis of claim is protected under the Antarctic Treaty. For these reasons we would not concur that the "Area" includes the physical continental shelf off Antarctica.

The U S. position is now reflected along with the position of the other 13 Antarctic Treaty Consultative Parties in recommendation IX–1 of the 11th Antarctic Treaty Consultative Meeting, recently concluded in Buenos Aires which is attached. You will see that the Consultative Parties intend to develop a minerals regime for Antarctica which will include the continent and its offshore areas but will not include the deep seabed south of 60 degrees South latitude.

The Antarctic Treaty system is operating very well in Antarctica and its surrounding offshore area and we do not believe that activity in the Law of the Sea Conference can be construed to negatively impact on the rights and obligations of the parties to the Antarctic Treaty.

Attachment—As stated.

ANTARCTIC MINERAL RESOURCES

The Representatives,

Recalling the provisions of the Antarctic Treaty, which established a regime for international cooperation in Antarctica, with the objective of ensuring that Antarctica should continue forever to be used exclusively for peaceful purposes and should not become the scene or object of international discord;

Convinced that the framework established by the Antarctic Treaty has proved effective in promoting international harmony in furtherance of the purposes and principles of the United Nations Charter, in prohibiting inter alia any measures of a military nature, in ensuring the protection of the Antarctic environment, in preventing any nuclear explosions and the disposal of any radioactive waste material in Antarctica, and in promoting freedom of scientific research in Antarctica, to the benefit of all mankind;

Convinced further of the necessity of maintaining the Antarctic Treaty in its entirety and believing that the early conclusion of a regime for Antarctic mineral resources would further strengthen the Antarctic Treaty framework;

Desiring without prejudice to Article IV of the Antarctic Treaty to negotiate with the full participation of all the Consultative Parties to the Antarctic Treaty an appropriate set of rules for the exploration and exploitation of Antarctic mineral resources;

Noting the unity between the continent of Antarctica and its adjacent offshore areas;

Mindful of the negotiations that are taking place in the Third United Nations Conference on the Law of the Sea;

Reaffirming their commitment to the early conclusion of a regime for Antarctic mineral resources which would take due account of the respective interests of the Consultative Parties as regards the form and content of the regime, including decision-making procedures, as well as the special characteristics of the Antarctic area;

Recalling Recommendations VII–6, VIII–14, IX–1 and X–1;

Recalling further Recommendations VI–4, VII–1, VIII–11, VIII–13 IX–5, IX–6 and X–7.

Recommend to their Governments that:

1. They take note of the progress made toward the timely adoption of a regime for Antarctic mineral resources at the Eleventh Consultative Meeting and related meetings and the importance of this progress.

2. A regime on Antarctic mineral resources should be concluded as a matter of urgency.

3. A Special Consultative Meeting should be convened in order:

(a) to elaborate a regime;

(b) to determine the form of the regime including the question as to whether an international instrument such as a convention is necessary;

(c) to establish a schedule for negotiations, using informal meetings and sessions of the Special Consultative Meeting as appropriate; and

(d) to take any other steps that may be necessary to facilitate the conclusion of the regime, including a decision as to the procedure for its adoption.

4. The Special Consultative Meeting should base its work on this Recommendation and the relevant Recommendations and Reports of the Eighth, Ninth and Tenth Antarctic Treaty Consultative Meetings.

5. The regime should be based on the following principles:

(a) the Consultative Parties should continue to play an active and responsible role in dealing with the question of Antarctic mineral resources;

(b) the Antarctic Treaty must be maintained in its entirety;

(c) protection of the unique Antarctic environment and of its dependent ecosystems should be a basic consideration;

(d) the Consultative Parties, in dealing with the question of mineral resources in Antarctica, should not prejudice the interests of all mankind in Antarctica;

(e) the provisions of Article IV of the Antarctic Treaty should not be affected by the regime. It should ensure that the principles embodied in Article IV are safeguarded in application to the area covered by the Antarctic Treaty.

6. Any agreement that may be reached on a regime for mineral exploration and exploitation in Antarctica elaborated by the Consultative Parties should be acceptable and be without prejudice to those States which have previously asserted rights of or claims to territorial sovereignty in Antarctica as well as to those States which neither recognize such rights of or claims to territorial sovereignty in Antarctica nor, under the provisions of the Antarctic Treaty, assert such rights or claims.

7. The regime should inter alia:

I. Include means for:

a. assessing the possible impact of mineral resource activities on the Antarctic environment in order to provide for informed decisionmaking;

b. determining whether mineral resource activities will be acceptable;

c. governing the ecological, technological, political, legal and economic aspects of those activities in cases where they would be determined acceptable, including:

the establishment, as an important part of the regime, of rules relating to the protection of the Antarctic environment; and

the requirement that mineral resource activities undertaken pursuant to the regime be undertaken in compliance with such rules.

II. Include procedures for adherence by States other than the Consultative Parties, either through the Antarctic Treaty or otherwise, which would:

a. ensure that the adhering State is bound by the basic provisions of the the Antarctic Treaty, in particular Articles I, IV, V and VI, and by the relevant Recommendations adopted by the Consultative Parties; and

b. make entities of that State eligible to participate in mineral resource activities under the regime.

III. Include provisions for cooperative arrangements between the regime and other relevant international organizations.

IV. Apply to all mineral resource activities taking place on the Antarctic Continent and its adjacent offshore areas but without encroachment on the deep seabed. The precise limits of the area of application would be determined in the elaboration of the regime.

V. Include provisions to ensure that the special responsibilities of the Consultative Parties in respect of the environment in the Antarctic Treaty area are protected, taking into account responsibilities which may be exercised in the area by other international organizations.

VI. Cover commercial exploration (activities related to minerals involving, in general, retention of proprietary data and/or non-scientific exploratory drilling) and exploitation (commercial development and production).

VII. Promote the conduct of research necessary to make environmental and resource management decisions which would be required.

8. They promote and cooperate in scientific investigations which would facilitate the effective operation of the regime taking into account, inter alia, the relevant parts of the Report of Ecological, Technological and other Related Experts on Mineral Exploration and Exploitation in Antarctica (Washington, June 1979), attached as an annex to the Report of the Tenth Consultative Meeting.

9. With a view to improving predictions of the environmental impacts of activities, events and technologies associated with mineral resource exploration and

exploitation should such occur, they continue with the assistance of the Scientific Committee on Antarctic Research, to define programs with the objectives of:

a. Retrieving and analyzing relevant information from past observations and research programs;

b. Ensuring in relation to the needs for information identified by the Experts Report, that effective use is made of existing programs;

c. Identifying and developing new programs that should have priority, taking account of the length of time required for results to become available.

10. In elaborating the regime, they take account of the provisions of Recommendation IX-1, paragraph 8.

Senator PRESSLER. This next relates to an earlier question. A new article 302 has been added to the most recent Law of the Sea text in an apparent attempt to avoid the conflict between export controls and mandatory technology transfer. Are you of the view that the article does, in fact, relieve the United States of problems on this point?

It has been argued that the article is too limited in its protective effect since the essential interest test it would impose is not clearly defined. It also has been pointed out that any technology withheld from the Enterprise on national security grounds would have to be withheld from U.S. companies which operate under license from the Enterprise.

In other words, we apparently would have to trade off our interest in assured access to minerals by giving up the ability of American companies to utilize necessary technologies in order to protect these sensitive technologies. Is this a tradeoff that we must make, or can the matter be resolved in more positive way?

Mr. MALONE. Well, as I have already noted in the discussion of my response to Ambassador Richardson's position on the transfer of technology, both regarding security-sensitive technology and the adequacy of compensation, yes; this definitely could be a very real problem.

I would be happy to respond more fully for the record on that. But, as I already have noted, article 302 does present a real problem in this connection.

Senator PRESSLER. Thank you.

[The information referred to follows:]

PROBLEMS OF ARTICLE 302

[SUBMITTED BY THE DEPARTMENT OF STATE]

Article 302 of the Draft Convention allows restrictions on the transfer of technology only on grounds of national security, while the Export Administration Act of 1979 permits the President to restrict exports on the grounds of national security, foreign policy, or shortages of supply. It may be argued that the President's statutory authority contains sufficient discretion to reconcile the provisions of the Export Administration Act with article 302. Under such an interpretation, the Export Administration Act may be administratively implemented in a manner consistent with the technology transfer obligations of the current Draft Treaty.

However, actual denial of an export license for requested seabed mining technology may lead to legal ramifications, including prohibition on the use of a restricted technology, under other provisions of the Draft Convention. Thus, the relationship of Article 302 to transfer of technology provisions of the Draft Convention is being considered as an element of the Administration's policy review.

Senator PRESSLER. Senator Pell.

Senator PELL. Thank you, Mr. Chairman.

Mr. Malone, I was struck by your statement that you had received a whole range of reactions to our pulling back from the Law of the Sea discussions while we reexamined our position. You said that nations had expressed disapproval and approval.

Would you give me an example of a nation that expressed approval of what we did?

Mr. MALONE. Yes, Senator, I could.

Senator PELL. Just one nation.

Mr. MALONE. I think I ought to do that in executive session, Senator.

As I mentioned earlier in response to Senator Percy's question, there was, indeed, a range and there were some that certainly gave strong approval, but I think it would be inappropriate to state that in open session. I would be happy to give you that information directly or in executive session.

Senator PELL. Why don't you submit that for the record on a classified basis?

Mr. MALONE. I would be happy to do that.

Senator PELL. Thank you very much, indeed.

[The information referred to is classified and is retained in committee files.]

Senator PELL. What really is the purpose of the session at Geneva from the viewpoint of the other nations if we have reached the decision now that we will not make up our minds what we will do, what our policy will be, until, presumably, early September?

Mr. MALONE. As I have mentioned, Senator, it is important to the other nations that we participate in this treaty. The treaty will not be fully effective and in their interests to the degree that it would be if we did not participate. Therefore, I think it is in their interest that they discuss with us the points that have been clearly identified.

While we will not be negotiating, I do not mean that we will not be having very hard, specific discussions with them on issues of concern. I think it is in their interest as well as ours that we resolve these issues so that we can go on to the final conclusion of a treaty that would be acceptable to the U.S. Congress.

I think that they really very much want our participation.

So, we would hope that we could utilize the August session in that context, and I think it is in their interest to participate with us in that way.

Senator PELL. Is there any doubt in your mind that, if the administration wanted to have the present treaty ratified, the Senate would ratify it? Honestly?

Mr. MALONE. The present text?

Senator PELL. The present text.

Mr. MALONE. I very much doubt that the Senate would proceed to grant its advice and consent in regard to the present text.

Senator PELL. If the administration was behind it? That was my question.

Mr. MALONE. I think perhaps even if the administration were behind it, there would be serious questions. Indeed, these questions were raised by many, many Members of the Senate, perhaps a

majority—I would hesitate to give any exact number—before this administration came into office. It would be my judgment—and this is only a personal judgment—that, even if the administration were taking a position in support of or taking a somewhat neutral position on the treaty, it is quite doubtful that the Senate would be prepared to go ahead with advice and consent.

Senator PELL. Is there any group, any segment of American enterprise, that is opposed to the treaty, except for the mining interests? So far as I understand it, the defense industry was strongly supportive, the ocean-related and scientific industries were strongly supportive. However, I understand that perhaps a question has been raised more recently regarding defense, and the mining industry has been gotten to, too. I am curious as to where you feel there is opposition.

Mr. MALONE. Senator, I think there are varying criticisms and varying overall assessments of the treaty that come from various places. I don't think that it is accurate to characterize the matter as merely a problem that the ocean mining industry has. Certainly it does have problems, but there are others that have problems as well, not the least of which are many Members of the Senate and many Members of the House.

I am not sure that it is entirely accurate to indicate that there are no concerns about the navigational or defense portions of the treaty. Again, I hasten to say that this has not been perhaps as specifically stated. But I don't think that one can say there is absolutely no objection to this treaty except that arising from the deep sea mining industry.

Senator PELL. Would you give me a specific example of another objection, one not related to deep seabed mining. It does not have to be classified or done in executive session. Just give me a sample.

Mr. MALONE. I think there certainly is the problem that we just examined with regard to the royalty concerning the shelf outside of the 200-mile limit. We addressed this just a few minutes ago. I think this may indeed raise some questions from the oil industry's point of view, although in some cases it has been characterized as not having any objection. I think there are some potential questions that arise there, and we certainly are looking at these.

There are questions also in the fisheries area. I think we may well see some near-term specific expressions of concern from the fishing industry.

Senator PELL. I follow the fishing industry fairly closely. What would be an example of its specific concerns?

Mr. MALONE. I think, Senator, that segments of the fishing industry feel that the domestic law as it presently exists, fairly well serves their interests. They don't see any real need for change. They think that the Law of the Sea Treaty would result in some changes that might not be of particular interest to them.

I think, perhaps, in this connection, I might submit for the record some of the specific concerns that have been expressed.

Portions of the fishing industry have expressed their worries about the effects the treaty would have on fisheries development efforts. We can be more specific about that for the record.

Senator PELL. Please do.

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I would like to know which portions of the fishing industry have expressed these objections.

That certainly is not a matter for executive session and is not classified.

Mr. MALONE. Senator, we have had concerns expressed by both the fish harvesting and fish processing segments of the industry. We can provide you with correspondence, as I have just mentioned, on these points.

Senator PELL. I would appreciate that, because my conversations with people in the fishing industry—and fishermen are very vocal about their complaints—as a general rule show that they are favorable to this treaty. I would be very interested to learn of anything to the contrary.

Mr. MALONE. We would be happy to provide that for the record because, obviously, it is something we are very much taking into account in our review process.

[The information referred to follows:]

NATIONAL FISHERIES INSTITUTE, INC.,
Washington, D.C., June 15, 1981.

Mr. THEODORE KRONMILLER,
Deputy Assistant Secretary for Oceans and Fisheries Affairs,
Department of State, Washington, D.C.

DEAR TED: The Administration's decision to conduct a thorough review of the draft Law of the Sea Convention is necessary and appropriate. The very duration of the deliberations, spanning several Administrations, dictates a deliberate, painstaking analysis of not only the impact of the treaty, but also its political feasibility. Such action is particularly important in those areas where U.S. national policy has undergone rapid change since the onset of the Treaty discussions in the late 1960's. I am, of course, concerned with the Treaty as it would affect the U.S. fisheries, which are operating in 1981 under a totally different national policy than existed in the late 1960's and early 1970's.

Initiated by the lethargy of the LOS process itself and shaped by farsighted legislators (and their staffs), U.S. fishery policy has slowly evolved to a more aggressive, purposeful dedication to use of national resources for the benefit of the United States citizenry. We should not allow the progress of the past few years to be diluted or compromised by the Treaty.

This is not meant to imply a negative attitude towards the concept of a Law of the Sea Treaty. I believe national and international benefits will flow from a treaty provided, of course, our interests are not undermined in the process.

I'm certain your review will compare the draft provisions to existing U.S. law and regulations pertaining to fisheries management. I would like to call your attention to those articles that are of particular concern to the National Fisheries Institute.

ARTICLE 61—PARAGRAPH 3

While the draft indicates environmental and economic factors shall be qualifications of the maximum sustainable yield, I'm not certain the paragraph fully protects the concept of optimum sustainable yield as a means of fishery development. The phase-down concept of the Breaux bill could be invalidated.

ARTICLE 62—PARAGRAPHS 2 AND 3

The draft appears to give priority to allocations of "surplus" to developing nations, especially those which might lay claim to geographical characteristics. You, more than anyone else, are well aware of the legislative steps taken to set the stage for allocation of surplus resources to achieve trade objectives. Trade with regional geographically unique nations is rather unlikely, so the draft article could be a problem for development of our resources. Similarly, paragraph 3, citing traditional rights, could be a problem.

ARTICLE 66

This draft article weakens the provisions of the FCMA in regards to anadromous stocks, especially paragraph 3(b), which opens the door to formal disputes rather than negotiations as are now conducted.

While the concern over the draft convention are few in number, they are significant. We ask that they be considered in your formal review.

Sincerely,

LEE J. WEDDIG,
Executive Vice President.

Senator PELL. From a defense viewpoint, let's say, for the sake of argument, that we don't go ahead with the treaty and the other nations do. Suppose further that we recognize the 12 mile limits with respect to territorial waters as most countries already do, with the exception of the United States. Would that not then close the Straits of Gibraltar to our fleet?

Mr. MALONE. The defense aspects are those which we have intensively under review. The sense that I meant to convey, Senator Pell, was that I do not think it necessarily can be assumed that there has been no change in that position.

Again, I would not wish to discuss at this point in open session the exact nature of some of those expressed concerns. It is part of the review process. As I have indicated, we are going to keep you very closely and completely informed on this. I certainly would propose to discuss this with you in either executive session or in personal conversation.

You bring up an important point, but it is something I don't think we really fully can explore on the open record.

Senator PELL. But, in general, certainly, it is to our advantage to move ahead from the defense viewpoint, I would think—or, has the Pentagon changed its position?

Mr. MALONE. Again, Senator, I have to emphasize that we are looking very critically at that, and I cannot tell you definitively that the Pentagon view remains exactly as it has been in the past. This is something that is being looked at very, very carefully.

Senator PELL. Well, let's imagine a world without a treaty of this sort, or without our participation in one. I think the stack of cards well could fall down if we did not participate in it.

Would this then mean, as time moves on, that we would have creeping jurisdiction claims by coastal states. We started the whole problem with President Truman's outer limits to how far one could utilize or gain the usufruct from the sea so far as is practical.

Mr. MALONE. The exploitability criterion?

Senator PELL. Yes; the exploitability provision. This started the whole ball rolling.

Is there any question in your mind that, if we have no treaty at all, nations that have the technical ability will go out and extend new borders way out to sea, or that we will have a system of anarchy?

I don't see any alternative, do you—to no treaty?

Mr. MALONE. Indeed, Senator, even with a treaty we would have that potential.

Senator PELL. Which potential—anarchy or the extension of borders?

Mr. MALONE. The potential of continuing to go out. The treaty does not necessarily preclude that from occurring.

Of course, the no-treaty situation, as I have mentioned, would raise certain possible results, and those are matters which we are addressing intensively in the review as to what we would have to do, what actions we would have to take in connection with a no-treaty situation.

But, again, I want to emphasize very strongly that we have not come down on such an option, and no one should feel that we have. It merely is something that we are addressing in the review process, and nothing more.

Senator PELL. I have a few points to mention.

I think the treaty does cover this question of creeping jurisdiction because it provides for the 200-mile exclusive economic zone, and it limits territorial waters to 12 miles. I do not understand what you mean when you say that the treaty would permit—and I forget the name of the fellow who drew up the lines—I think it was Mr. Franks, in one of his previous incarnations—at any rate, I think that would be prevented by the treaty.

Why would it not?

Mr. MALONE. I did not mean that it would not be prevented by the treaty. I said, I believe, that even with the treaty we might have this. This is because of two factors: one, all states might well not join the treaty and, therefore, they could make such moves; two, there is provision for denunciation after 1 year under the terms of the treaty. So, it is not that there are not provisions covering that in the treaty. It is merely that the treaty solution does not necessarily preclude that sort of thing from happening in the future.

Senator PELL. But certainly if the treaty were signed by everybody, it would be precluded. Wouldn't that be correct?

Mr. MALONE. Except for the denunciation provision, yes.

Senator PELL. Incidentally, in connection with the viewpoint of the military, on April 29, 1981, at a hearing in the House of Representatives a letter was submitted from General Allen expressing vital interest in the development of the Law of the Sea Treaty. I would ask for unanimous consent that this same letter be inserted into the record.

Senator PRESSLER. Without objection, it is so ordered.

Senator PELL. Thank you.

[The information referred to follows:]

LETTER OF APRIL 3, 1981, FROM GEN. LEW ALLEN, JR., CHIEF OF STAFF, U.S. AIR FORCE, TO HON. BENJAMIN A. GILMAN

DEPARTMENT OF THE AIR FORCE,
OFFICE OF THE CHIEF OF STAFF,
Washington, D.C., April 3, 1981.

Hon. BENJAMIN GILMAN,
Committee on Foreign Affairs,
House of Representatives, Washington, D.C.

DEAR MR. GILMAN: Thank you for the invitation to comment on your remarks about the Law of the Sea Treaty and the letter to Secretary Haig from you and other members of Congress which appeared in the Congressional Record on March 12, 1981.

The Air Force has a vital interest in the development of a Law of the Sea Treaty. We have long been concerned about access to airspace over the oceans and above international straits and archipelagic waters.

We are confident that the Administration's review of the draft Treaty will take into full account the need to preserve the mobility of United States armed forces on, under and over the oceans and international waterways. You may be assured that these interests will be given foremost consideration by the Air Force.

Sincerely,

LEW ALLEN, JR.,
General, USAF, Chief of Staff.

Senator PELL. Mr. Chairman, I probably have talked long enough. Don't you have questions you wish to ask now?

Senator PRESSLER. That's all right, please go ahead. I've asked all my questions, I believe.

Mr. MALONE. Senator, might I respond to that last point?

Senator PELL. Please.

Mr. MALONE. I am very much aware of the letter to which you have referred. I might just remark that, again, the JCS has this matter under review and I could not be certain at this point whether General Allen's position will continue to be as expressed in that letter.

Senator PELL. I'd like to get to the bottom of this, if I could, because I detect a real hesitation on your part.

What is your worry, your concern, about the treaty? Don't you think that we and the world would be better off with a treaty than without one, in all candor? Or are you just trying to get a better treaty?

Mr. MALONE. In all frankness, Senator, that is exactly what we are trying to determine in this review process. We have not determined that one way or the other at this point, and we feel that this is why the review process is so fundamentally important. We must make that determination from the perspective of what is in our net national interest. This really is the bottom line of what this review process is all about.

It is not necessarily about just a fix here and a fix there. It is what is going to be in our best national interest. We have to look at all of the possibilities.

Obviously we have to be in a position where a two-thirds majority of the Senate is going to agree with that assessment.

Senator PELL. But we cannot get a treaty that is carved or tailored to our national interest alone because there are other nations involved as well. It is a question of getting one where the general balance is more in our interest than it would be in another treaty, or than would be the case with no treaty. That really is what we have to determine.

It would be to my mind very much as if France, which just had a change of government, and which is a pretty hefty seagoing power with its own expert technology in this field, decided it would wait about a year to continue negotiations on this treaty. That period is about what it is likely to be for us because our election was in November and it probably will not be until October that you have your review in hand. Well, I think the rest of the world would scream pretty loudly if France were to hold it up, don't you?

Mr. MALONE. Well, I really would not be prepared to take a definitive position on that. This administration felt, Senator, that it was absolutely essential from our point of view that we look carefully at this in terms of what the Senate is going to be prepared to ratify. It is our view that the present treaty is not ratifiable.

Senator PELL. I think we have to be careful not to forget that we are all residents of the planet Earth and not to become solipsists. As you know, a solipsist is an individual who feels that everything in the world is a figment of his or her imagination and only he or she really exists.

I think sometimes we have somewhat solipsistic views of the world.

Do you anticipate any further changes in personnel in our delegation?

Mr. MALONE. Senator, of course there is always that possibility. At the present time, I have nothing specifically in mind. But, as the head of the delegation, I will have to make judgments as to the appropriate requirements at our August session and act accordingly. But I have nothing specifically in mind at the present time.

Senator PELL. As head of our delegation you should have the rank or status of ambassador. Have you been nominated for that rank yet?

Mr. MALONE. No; I have not been yet.

I am the Special Representative of the President for the Law of the Sea. But, at the present time, I have not been nominated for the rank of ambassador.

Senator PELL. My recollection is that your predecessors held that rank.

Mr. MALONE. That is correct, Senator.

Senator PELL. Well, I think it would be in our national interest if the head of our delegation carried this same title.

Mr. MALONE. Well, Senator, I had to get through one confirmation process first before beginning another. [General laughter.]

Senator PELL. That's right. Also, you could carry personal ambassadorial rank for these negotiations, and that does not require confirmation.

Mr. MALONE. Yes, that's correct.

Senator PELL. Mr. Chairman, I do have some other questions, but I would like to submit those for the record.

Senator PRESSLER. Without objection, it is so ordered.

Senator PELL. These include questions, too, from some of my colleagues on the minority side.

Senator PRESSLER. Of course.

Let me say that I think it is good that we are considering that the treaty could be ratified. As Senator Percy has said, the Senate should be consulted, as you are doing. I have heard it said that if the President were strongly in favor of this treaty or if, after the review, it reached a point where the President and the administration were comfortable with it, there probably would be at least between 30 and 40 votes on the Republican side for such a treaty. That would mean that the Democrats would have to produce between 27 and 37 votes, at least.

I have never done an assessment of the Democratic side, but do you think you could produce that vote, Senator Pell?

Senator PELL. If the administration were strongly behind it, there is no question in my mind about that.

Senator PRESSLER. So, then, those numbers are within the realm of possibility—if the administration became comfortable, as it must do, in its review process.

We in the Senate will continue to follow closely what you do. We will listen and will have our input, as we have been doing.

Earlier, Senator, when you were out of the room, the administration committed itself to consult closely with you, Senator Percy and others of us in this body.

Mr. Malone, I have no more questions, but would leave the record open for another Senator if there are further questions.

I think we have accomplished our purpose this morning, that of getting a feel for where the administration is on this matter.

We look forward to hearing from you further and thank you very much for your appearance here today.

Mr. MALONE. Thank you very much, Mr. Chairman.

Senator PRESSLER. Thank you very much, Mr. Malone.

There being no further business before the subcommittee, I hereby declare this meeting closed.

[Additional questions and answers follow:]

STATE DEPARTMENT RESPONSES TO ADDITIONAL QUESTIONS ABOUT MR. RATINER SUBMITTED FOR THE RECORD

Question 1. What was Leigh Ratiner's status on the U.S. delegation to the LOS conference held in New York?

Answer. Mr. Ratiner's status on the U.S. Delegation to the Law of the Sea Conference session in New York was that of an adviser.

Question 2. Was he reimbursed for his participation? If so, what funds were used to pay Ratiner?

Answer. Mr. Ratiner was not reimbursed for his participation.

Question 3. Is Leigh Ratiner participating in the current interagency review of the LOS text? Did Ratiner draft or participate in the drafting of one or more of the papers for the interagency review? If yes, did Ratiner hold security clearances appropriate to the level of sensitivity of the material he might have used in the course of his participation? Did he receive remuneration for his efforts?

Answer. Mr. Ratiner has provided some limited advice relating to the interagency review. However, review papers are being drafted by government officials and are subject to the formal clearance process of the Interagency Group.

Mr. Ratiner did provide input to the drafting of one paper, an historical summary, at the outset of the review. His work in that area did not require any security clearance, as he had no access to classified information or materials, but rather drew upon his recollection of events. He has not received remuneration for his efforts.

Question 4. Did you request Commerce to extend Ratiner's contract? Why? What was Commerce's response? Weren't the activities which you wished added to the current study the very same issues that are currently being studied by the inter-agency group? If no, in what way does it add to what is being done in the course of the review?

Answer. As Assistant Secretary Designate for Oceans and International Environmental and Scientific Affairs, I requested the Department of Commerce to consider amending their contract with Mr. Ratiner' firm, Dickstein, Shapiro & Morin, to add a new task that would entail the tactical and strategic advice described above, as well as other analytical work. The Commerce Department declined to amend the contract. This proposed task did not entail the provision of services by the contractor which would duplicate the work of the Interagency Group. The Department of State believed that this proposed additional task would be helpful to it in its work related to the Law of the Sea Conference.

Question 5. Has Ratiner met fully the terms of his current contract with Commerce? Specifically, has he met its terms with regard to the timing and delivery of progress reports or drafts?

Answer. The Department of State is not in a position to respond to this question. A determination of this nature would be made by the Commerce Department, with which Dickstein, Shapiro & Morin has the contract.

Question 6. Have his activities with respect to the Law of the Sea Conference interfered with his ability to meet the terms of his contract?

Answer. We are not aware of any suggestion by the Department of Commerce that Mr. Ratiner's activities with respect to the LOS Conference have interfered with his ability to meet the terms of his contract.

Question 7. What were the original terms of Ratiner's contract? What changes did you propose? Does this extend the length of the contract? By how many months? How much additional money was Ratiner to get for the extension? What funds were to be used to pay for this extension?

Answer. Questions about the original contract will be more properly answered by the Department of Commerce. Under the proposed amendment, Dickstein, Shapiro & Morin would have expanded its analysis of the prospective legal regimes for ocean mining to include detailed review and assessment of various negotiating strategies and tactics. The proposal did not include any extension in the time for completion of the original work required under the Commerce Department contract but would have allowed the contractor an additional three months to complete the new task. The proposed amendment contemplated that the contractor would have been compensated for the added work at a cost of $74,565 plus incidental travel and per diem. These funds would have been paid from the current operating budget of OES. The State Department is considering the possibility of contracting directly, as an alternative.

Question 8. Are you aware that Leigh Ratiner's firm of Dickstein, Shapiro & Morin represented mining and fishing interests during the time that he was adviser to the LOS delegation? Does this concern you?

Answer. We were fully aware that Mr. Ratiner's firm represented U.S. shrimp fishermen during the time he was an adviser to the LOS Delegation in New York. Mr. Ratiner informed us that his firm did not represent any mining interests with or without an interest in the Law of the Sea Conference. He has reaffirmed that his firm presently represents no clients with mining interests and that it has not represented Mitsubishi on any mining matter for two years. Last year, the firm provided limited advisory services to Mitsubishi on a fishing matter and, through administrative oversight, failed to terminate its lobbying registration report for Mitsubishi at the time such services ceased in August 1980. We believe that Mr. Ratiner's work on behalf of U.S. shrimp interests creates no difficulties so far as his status as adviser to the U.S. Delegation is concerned.

Question 9. Given that association, do you think it appropriate that Ratiner participate in the interagency review?

Answer. As noted, Mr. Ratiner has provided advice to the State Department solely at our request and has provided some limited advice in the review process. We perceive no impropriety in receiving advice from Mr. Ratiner on these matters.

[Whereupon, at 11:52 a.m., the subcommittee adjourned, subject to call of the Chair.]

LAW OF THE SEA NEGOTIATIONS

WEDNESDAY, SEPTEMBER 30, 1981

UNITED STATES SENATE,
SUBCOMMITTEE ON ARMS CONTROL, OCEANS,
INTERNATIONAL OPERATIONS AND ENVIRONMENT OF THE
COMMITTEE ON FOREIGN RELATIONS,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:30 a.m., in room 4221, Dirksen Senate Office Building, Hon. Larry Pressler (chairman of the subcommittee) presiding.

Present: Senators Pressler, Helms, and Pell.

Also present: Representative Bedell.

Senator PELL [presiding]. The Committee on Foreign Relations will please come to order. The chairman of this hearing, Senator Pressler, has asked that we begin, and I am opening this subcommittee hearing in accordance with his wishes.

Today the subcommittee holds its fourth hearing on this session of American participation in the Law of the Sea Conference. Hopefully, at our next hearing in the not-too-distant future, the administration will be able to give us a definitive answer on the President's decision with respect to future American participation in these negotiations and in the comprehensive Law of the Sea Treaty.

As you know, I briefly attended the August session of the Law of the Sea Conference in Geneva and thought I would share a couple of impressions with you. First, I believe that Ambassador Malone did an able job of representing the United States, given his very difficult instructions, namely, not to negotiate and yet be at a negotiating table in an attempt to assess the negotiability of a number of pretty fundamental changes in deep seabed mining provisions of the draft convention.

Second, I would have to add that, based upon my discussions with other delegations, some of whom I have known over a period of many years, most if not all of the other participants of both developed and developing nations are prepared to go it alone, to go forward without the United States, and to conclude negotiations on a comprehensive Law of the Sea Treaty.

However, most of these participants, particularly our allies, would prefer that the United States remain a party to these negotiations and would hope that the United States would sign a treaty when one finally is completed.

I must say that I think they showed much patience, in my view, in once again delaying the work of the Conference, to give the United States more than ample time to complete its review. But I do not

think that their patience is infinite. We must make up our minds one way or the other by the next session, which is scheduled to begin on March 8, 1982, in New York.

I would commend our chairman for bringing together these witnesses, many of whom attended the August session of the Conference. I would be interested in hearing their impressions of the Conference.

Finally, I am told that shortly the President will be presented with the results of a 7-month interagency review of the draft convention and will make the final determination as to whether or not the United States will participate in next year's session of the Conference.

Based upon a question I put to Secretary Haig last September 17, it would appear that he is predisposed to support continued U.S. participation. I hope that this is also the President's decision, as I am confident, based upon my impressions from Geneva, that other participants are willing to meet the United States halfway.

I would add, on a more personal note, having worked on this idea of developing a Law of the Sea Treaty since 1967, I would hope to see it come to be in a relatively short period of time.

Our first witnesses today are Ambassador Elliot Richardson and Ambassador T. Vincent Learson. I believe Ambassador Learson would like to begin the discussion. I would ask you both to come to the witness table.

STATEMENT OF HON. T. VINCENT LEARSON, FORMER HEAD OF THE U.S. LAW OF THE SEA DELEGATION UNDER PRESIDENT FORD

Ambassador LEARSON. Thank you, Senator Pell.

I am appearing today not only as a former head of the U.S. Law of the Sea delegation but also in a private capacity and as a member of the Public Advisory Committee to the Department of State for the Law of the Sea Treaty.

Mr. Chairman, the history of the negotiation is long and complex, and there would be little value in retracing it here. I believe you are all well aware of the facts. I simply point to that history and the personal dedication of a large number of U.S. participants over the years as indicative of a longstanding recognition spanning several administrations that the broad range of subject matters under consideration at the Law of the Sea Conference engage strong and vital U.S. interests in the establishment of a stable regime to insure peace to two-thirds of the world's surfaces.

This morning I will limit my comments to deep sea mining because it is recognized in all quarters that the metals present in the deep seabeds are vital to the long-term strategic resource interests of the United States. Others who will testify before this subcommittee will speak more eloquently than I to the other aspects to the treaty.

While I wholeheartedly endorse the administration's review of the treaty and share their real concerns with regard to the provisions of deep sea mining. I would also urge the Congress to encourage the administration to continue negotiations.

Mr. Chairman. I am not in a position to prejudge the results of the administration's review, but I would like very briefly today to outline

some of my own thoughts on the status and direction of the Conference and the role of the United States in it.

First, it is my view that completion of a treaty acceptable to the United States is preferable to any other option available to us. For American industry to mine the deep seabeds requires assured access, secure tenure of operation, and sound economic terms to insure the necessary financing of such huge risk-taking projects. Since day 1, a legal regime agreed to by all nations which assures such terms has been the objective of the United States in participating in the Conference and, in my view, still is worth fighting for.

Second, I believe that the atmosphere and the mood in the Conference is such that important changes in the seabed mining texts can be achieved—changes that will enhance the acceptability of the treaty to American industry, the administration, and the Congress.

I think the statement made by Mr. Ul-Haque, chairman of the Group of 77, on August 10 is significant in that regard. It is perhaps more notable for what it did not say than for the criticisms it leveled at the United States. It did not say that any attempt to consider any U.S. concerns with the treaty would be futile. It also did not say that no changes were possible.

Senator PELL. Excuse me for interrupting for the moment. I believe Congressman Bedell is here. I would suggest that if he wishes, he might like to come to the Senators' table and sit among us.

Mr. Learson, forgive the interruption, and please carry on.

Ambassador LEARSON. In fact, the entire thrust of that statement seemed to be an appeal to the United States to be specific in its concerns so that meaningful responses could be prepared. I view that as clear evidence of a willingness to negotiate.

The most recent negotiating session of the Conference has provided the opportunity for such continued negotiations. The work program adopted last July for the upcoming 1982 session provides for the continuation of consultations and negotiations on pending issues during the first phase of the 1982 session.

It also provides that the collegium, following normal Conference procedures, might include any changes resulting from those discussions into the text.

Thus, the atmosphere seems to be right and the opportunity is there. However, it must be kept in mind that the time at the 1982 session will be extremely limited. The rifle shot rather than the broadside approach must be taken. Therefore, specific pragmatic rather than purely ideological changes should be sought.

Recommendations as to specific detailed improvements which would be necessary to make the treaty acceptable to U.S. businessmen have been addressed to the Congress and the State Department on several occasions and, I assume again will be addressed to you for your considerations during the course of these hearings.

Therefore, I will just briefly enumerate today what seems to me to be essential improvements which we should seek.

First, assured access and security of tenure. The U.S. objective has always been that access must be "assured" to a qualified contractor. The current terms of the treaty appear to be unduly complex and, in some eyes, place too much discretion in the hands of the bureaucracy

of the authority. It is also thought by some that the production limitation provisions magnify the possibility that this discretion will be used in a discriminatory manner against applicants.

Security of tenure also is worrisome. Some fine tuning must be made in this provision to reduce the authority's discretionary power to the point where the authority must not interfere with an operator once it has determined that he is a qualified applicant. It must be recognized that mining in the depths of the ocean is a novel and untested enterprise. It is absolutely an impossibility to foresee the conditions which may prevail.

Second is the Assembly and Council of the Seabed Authority. The Seabed Authority should be first and foremost an entity for the promotion and coordination of production activities. However, reposing open-ended discretionary decision powers in the Assembly is not compatible with this responsibility. Therefore, the Assembly's list of powers should be specific and exhaustive and exclude production and other economic questions.

The power to resolve such questions should reside in the Council where relative economic interests are represented and can be properly weighted. Second, the Council, as the executive organ supervising economic enterprises, should be made to confirm to relative economic as well as political interests. The United States obviously should have a guaranteed seat. Weighted voting, commonly used by international economic bodies, should be used for basic economic issues.

Three is the transfer of technology. The requirement to transfer technology to the enterprise as a condition of license to exploit the seabeds is in itself onerous if fair and reasonable commercial terms for the transfer exist. This is not a novel practice for American industry. However, for it to be successful, it must be on a cooperative basis, which the Seabed Authority will soon learn.

But the requirement for mandatory transfer of third-party technology is unrealistic. It is presumably in the treaty because of the LDC's fear of fraudulent withholding of technology by a contractor. This fear could be better met by addressing the real issue head on; namely, fraud. All lawyers know how to draft proscriptions against fraud.

Further, the Brazil clause, which requires the mandatory transfer of technology to Third World countries, does not address most developing countries' problems. It is very unlikely that most Third World countries will ever have the resources to engage in deep sea mining.

Four is the Review Conference. The idea behind a Review Conference originated with Secretary Kissinger during my tenure. However, it was not contemplated that a vote of two-thirds of the nations would be able to bind the United States, and the normal expectation was that we would not be bound by a Review Conference amendment unless we ratified it.

There are certainly many ways to improve on the present text. The interest in the mining of the metals in the deep seabeds can be divided into certain economic groups, such as land-based producers, consumers, and seabed miners. A blocking vote could vest with any one of these groups, thereby protecting the interests of the United States.

Five is production limitations. As it is presently written, the limitation is tied to a minimum of 3 percent increase in nickel production.

It is strictly an interim limitation and, in my judgment, will not have a long-term negative impact during the period for which it is to be in effect.

This judgment is based on my understanding of the economics of deep sea mining and the slowness with which it will become a reality. I do, however, recognize that the production limitation formula, as it now reads, could create unacceptable startup allocation problems.

These problems are best addressed by an acceptable preparatory investment protection system. In this regard, I am assuming that the United States and the other developed nations are working on the creation of a preparatory investment protection proposal for the 1982 session. This is a matter of considerable importance to American industry.

Although this concludes my list of specific suggestions, I did not address a number of technical points that need correction. However, I assume a simple mechanism to conform the wording of the treaty to its clear intent will be created.

In conclusion, Mr. Chairman, I believe that industry requires an acceptable Law of the Sea Treaty and that critical defects in the present document can be addressed. It seems clear that other nations in the Conference, both in the Group of 77 and among our industrialized allies, sincerely desire U.S. participation in the conclusion of the treaty.

Accordingly, they will do anything that is reasonable to encourage such participation. Therefore, I urge, as others have, that the administration grasp this opportunity to bring the Conference to a successful conclusion at the earliest possible time. The President ultimately must decide if the results of the negotiations are acceptable. If the President makes a positive finding, the Senate must ultimately make the final decision.

Here you will evaluate not only whether the minimum legitimate concerns of American industry are met, but also whether the other sections of the treaty meet U.S. requirements.

The fundamental task of your evaluation will be to weigh and balance the many broad U.S. interests involved in the comprehensive treaty. May I suggest that the ultimate question is whether a regime for peace in the oceans has been achieved.

Thank you.

Senator PELL. Thank you very much, Ambassador Learson.

Ambassador Richardson, would you please proceed with your presentation?

STATEMENT OF HON. ELLIOT RICHARDSON, FORMER SPECIAL REPRESENTATIVE OF THE PRESIDENT OF THE UNITED STATES FOR THE UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA (UNDER PRESIDENT CARTER)

Ambassador RICHARDSON. Thank you very much, Mr. Chairman and members of the subcommittee. I appreciate this opportunity to appear before you and deliver what amounts essentially to a supplementary installment on the views which from time to time I have expressed to your subcommittee. That, fortunately, will enable me to be quite brief.

The Law of the Sea Treaty to this point has weathered an extraordinary series of hazards, shoals, squalls, gales, and near shipwreck. Yet, I think it is fair to say that it is now sailing into smoother waters.

In the past, Mr. Chairman, I have appeared before this subcommittee primarily as a defender of compromises negotiated during the course of long, hard-fought, and intensely difficult sessions of the Law of the Sea Conference. It may well be that I shall have the occasion or seek the opportunity to appear before this subcommittee again in the future to defend the text of the treaty. But I do not believe that that is either necessary or appropriate at this stage.

As your own opening statement emphasized, Senator Pell, the Conference has given the United States a chance to come forward with specific proposals for improvement of the deep seabed mining regime. Ambassador Learson has just and, I think, appropriately stressed the tenor of the statement by Ambassador Ul-Haque of Pakistan, the chairman at Geneva last August of the Group of 77, which is indicative of the readiness of the Conference to consider such proposals.

I believe there is a general agreement among all those of us who have taken an intense and continuing interest in the treaty from the U.S. side that we should take advantage of this opportunity. The only real issues are subsidiary to the basic judgment that we would be foolish to kick away the chance to get improvements that would not have been possible before the change of administration and before the changes in the composition of the U.S. Senate.

The only real questions thus are exactly what kind of changes to seek—how far, in other words, to press the opening that has been made available to us. Quite clearly, we should not settle for less than we could realistically hope to accomplish. Conversely, if we press too hard, we could well prejudice the opportunity to get changes that otherwise would be possible.

In listening just now to Ambassador Learson deal with some of the specific issues, I found myself in basic agreement with his enumeration of changes that should properly be sought—with one possible exception. However desirable the formulation of some system of weighted voting, I think it is seriously doubtful whether that is a feasible outcome at this stage.

But I think less important, Mr. Chairman, than questions of specific judgment about what changes to seek is the overall conclusion that the objective, the only objective, the overriding instructions of the U.S. delegation at the session to begin next spring, should be to aim at the improvements that are obtainable.

Other than the points made by Ambassador Learson in his review of desirable changes in the text, I would add only two rather limited points. One concern that still remains is the concern over the exercise by the Legal and Technical Commission of its power to approve an application for a plan of work.

The question has been raised as to the possible abuse of this power. While the text has enjoined the selection of members of the Commission on the basis solely of professional competence, nevertheless, I think it would help to provide insurance against at least the conjectural possibility of the abuse of their powers to provide for commercial arbitration of any issue arising from the manner in which those powers have been administered.

With respect to the production ceiling, I agree with Ambassador Learson's comments. But I think there may still be the possibility of reducing further concern lest the ceiling be inadequate at the outset to allow for the approval of all the applications by qualified seabed mining enterprises.

If the provision for calculation of the ceiling were made to run from a specific date rather than from whatever turns out to be the date of first commercial deep seabed mining—if that date were, for example, January 1, 1985—then, given the likely actual date of startup, there should be available ample room under the ceiling by the time that occurs.

In conclusion, Mr. Chairman and members of the subcommittee, I would say simply that the United States needs to have steadily in view two very fundamental considerations in addressing the question of how to pursue negotiations next year.

The first is that the U.S. would benefit from the safeguarding—the protection—the broader array of interests outside the field of deep seabed mining if this treaty does come into force.

There is no significant doubt, I believe, on the part of any of the groups concerned with environmental protection, marine and scientific research, the exploitation of oil and gas reserves, or navigation and overflight that these interests would be better served by a treaty than without one. If, therefore, the seabed mining regime has been made as good as it can be made, the United States can gain these other benefits only through a treaty.

The second point to be stressed is that we do not—we do not—face a situation in which the interest of the United States in access to deep seabed mining is proposed to be subordinated to other U.S. interests.

It is becoming increasingly clear that if the United States does not adhere to this treaty, the deep seabed mining industry in all likelihood will not be a U.S.-flag industry.

This is because it is now almost beyond question that most other leading industrial countries will adhere to the treaty. That is, the countries whose companies now are partners of U.S. deep seabed mining consortia will ratify it; their companies will operate under the treaty; the result, in turn, therefore, is likely that U.S. partners of those companies will follow their European or Japanese leaders into deep seabed mining under the treaty and that they will not operate either under U.S. domestic reciprocal legislation or under a minitreaty.

They will not do the former, because they will be unprepared to take the financial risks of unilateral deep seabed mining. They will not do the latter, because there will be no minitreaty, and there will be no minitreaty because we will have no partners in it.

It follows, then, Mr. Chairman and members of the subcommittee, that the only significant option available to the United States is to take advantage of the opportunity to get improvements in the treaty, to make it as good a treaty as possible, not alone for the sake of our companies or the national interests of the United States in access to deep seabed mining, but because it will be a better regime for the world community as a whole to the extent that it better secures the investments of those companies willing to take the risk of seabed mining, and because it will thereby better contribute to the exploitation of the common heritage of mankind.

That, I think, Mr. Chairman and members of the subcommittee, is a sufficient general overview of the situation as I see it. And I am sure that both Ambassador Learson and I would be very glad to respond to any questions.

Senator PRESSLER [presiding]. Thank you very much.

I apologize for being late. I was attending a meeting at the White House celebrating the new fiscal year. So I am here now to change subjects.

I appreciated your analysis. We did invite the administration to this hearing, but since they are nearing the completion of a review it was their feeling that they wanted to wait until it was finished before making comments.

I gather from reading Ambassador Learson's testimony and from hearing your comments, Ambassador Richardson, that you feel when we finish the review we may well be back on track without substantial damage—is that correct—in terms of this long review period?

Ambassador RICHARDSON. I would say that the short answer to that statement, Mr. Chairman, is "Yes," although I do not think I would go as far as to say that we have been off the track. We have engaged in what amounts to a rather long pause pending this review.

The risk was that because we were holding up on any concrete negotiations, there might be generated a reaction so negative on the part of the Conference that the opportunity later on to seek improvements in the text might have been forfeited or at least severely damaged.

As it is, I think that the degree of tolerance of the need of the United States for review and the patience demonstrated by the Conference has largely preserved the opportunity to seek improvements subject to the problems noted by Senator Pell in his opening remarks; that is, that the next session is going to be short and that we must therefore take maximum advantage of the opportunity between the President's final decision on the negotiating posture of the United States and the next session for intersessional consultations.

Ambassador LEARSON. Mr. Chairman, I look at it this way. I think the pause that has occurred equates to the seriousness that the administration places on the terms that are in the current treaty. That is good. That has raised great doubt in their mind. It certainly magnifies the importance of these issues.

You know, when you are negotiating, we talk of a no-sign article, we say, "This is a no-sign article." Well, they just do not know yet, but this is good. I think this puts us into a healthy position.

However, we must go to that Conference and we must prepare before that Conference immediately after the review of the administration is over, and hopefully, the conclusions will be positive. And if it is positive, it must be specific, it must be sharp, and it must start with negotiations with the nations around the world immediately so that when they get to the Conference, ideological things are put aside and specifics are hammered out on a no-sign basis.

I think this will get results. I do think that a large part of that Conference, a large part, a great majority, want the treaty and they want us in. They have nothing unless we are in it. I think we are in a very strong position and that we should be able to get some things that are essential, not all things, but everything that is essential.

Senator PRESSLER. Good. I have often said that in the arms control area I feel strongly that the Reagan administration is actually in a better position to negotiate on arms control domestically and internationally. And perhaps this is true, too, in the Law of the Sea area. When we finally have the review finished, I think perhaps it may be proven that this has been a healthy pause. I am certainly hopeful of that.

I will yield to my two colleagues for questions. We do have another hearing of the subcommittee following the conclusion of this one to confirm some very high-level officials of the administration. So we may have to move along a little quickly this morning. We may wish to submit additional questions for the record, too.

Senator Pell.

Senator PELL. Thank you very much, Mr. Chairman.

I would ask unanimous consent at this time to insert into the record an op-ed piece which I did last month, somewhat along the same lines as you just expressed, where with regard to the Law of the Sea I say:

I believe the lengthy review of the Conference issues that the administration has undertaken is beneficial. As time elapses, the new negotiators are exposed to the real world and the views of other governments. Prospects can only improve for American support of a broad internationally negotiated treaty.

I think the same views may apply with SALT II. If views had come out too quickly with the new administration, they would have been pinioned to campaign rhetoric. But after months go by, with the generally able people they have appointed, more sensible conclusions will emerge.

Senator PRESSLER. We will certainly insert this in the record at this point.

Senator PELL. Thank you.

[The information referred to follows:]

[From the Washington Post, Aug. 5, 1981]

A FOREIGN POLICY—IN TIME

(By Claiborne Pell)

The American people should be grateful that President Reagan has not yet spelled out his foreign policy in detailed manner. If he had, he would likely have been impelled to solidify his campaign rhetoric before reflecting sufficiently on the complexities of the world as it is.

President Reagan has, for the most part, chosen a foreign policy team of able, pragmatic and tough-minded men and women. Although their conservative attitudes represent a break with those of recent administrations—even Republican ones—there are some grounds for hoping that they will find sensible solutions—provided that they are free of artificial deadlines.

Many of us in Congress would like to see negotiations on a SALT treaty resumed as soon as possible. However, if the Reagan administration were to commit itself to deciding by a certain date what kind of agreement it would like, there is a real danger it would accept the nonsensical and unachievable goal, set out in the Republican platform, of achieving military superiority over the Soviets. A SALT proposal flowing from such a policy decision would be non-negotiable with the Soviets and would not reflect the many good points contained in the SALT II treaty negotiated by the Carter administration. With more time, the administration may realize that placing realistic and verifiable

constraints on Soviet strategic nuclear forces through a SALT agreement is just as important as new weaponry toward enhancing American security.

Similarly, on the Law of the Sea Treaty, I believe that the lengthy review of conference issues that the administration has undertaken is beneficial. As time elapses and the new negotiators are exposed to the real world and the views of other governments, the prospects can only improve for American support of a broad, internationally negotiated treaty.

Also, we ought to be thankful that the Reagan administration has not yet firmed up its ideas on how best to react to the continued Soviet occupation of Afghanistan. Although President Reagan has proposed sending large quantities of arms to Pakistan, he has not yet followed through on his campaign suggestion that the United States place a naval blockage around Cuba. We don't need another Caribbean crisis.

There are, on the other hand, a number of examples where our interests have suffered because the Reagan administration has rushed to judgment. In line with candidate Reagan's campaign statement that "the Soviet Union underlies all the unrest going on" in the world, the administration quickly escalated our commitment in El Salvador. We now know that much of the evidence on which the administration based its policy was questionable. As a result of this hasty policy decision, we now find ourselves blindly supporting a government that has been implicated in the murders of thousands of civilians, not to mention six Americans by its own security forces.

In the Middle East, too, the Reagan administration moved precipitately to institute a new policy based on its anti-Soviet campaign rhetoric. The administration concluded it was urgent to establish a "strategic consensus" directed against Soviet encroachment, which was presumed to be the major threat to American and friendly local interests. In its haste, the administration failed to recognize that the lack of progress in the search for peace between Israel and its Arab neighbors was a greater threat to stability in the area than Soviet influence. By concentrating first on the creation of an anti-Soviet coalition, the Reagan administration put the cart before the horse. The administration would have been better able to deal with the crisis over the Israeli raids in Iraq and Lebanon if it had devoted more time to studying the implications of regional rivalries.

There is a lesson to be learned by both the administration and its critics from the mistakes made and avoided to date: patience is likely to be rewarded. I am by nature an optimist, and I believe the administration will eventually come up with sensible, broadly acceptable policies if it takes the time.

Senator PELL. If I could just touch on a couple of points here.

Ambassador Richardson, you mentioned that you are in agreement with all of the points that Ambassador Learson raised, but for one. What was that one?

Ambassador RICHARDSON. That was on the issue of weighted voting, Senator Pell. I simply said: However desirable from the U.S. point of view, it seemed to me doubtful whether it was realistic to hope to be able to get it now.

Senator PELL. What concerns me the most, as you know, as I mentioned earlier, is this: I have pushed this idea since 1967 and was jeered for it at that time. But what impressed me the most at Geneva was the fact that we almost came within an inch—well, perhaps several inches—of the Conference going ahead without us. I think there was some very good dramatic footwork on the part of Ambassador Malone, who, in an appearance of conciliation on his part, helped to avoid that.

Would you sketch out for us your view of what would happen if the treaty went forward without the United States? What would that mean to the United States? And could we engage in deep seabed mining or, rather, how would we engage in deep seabed mining, if we were not participants in the treaty?

Ambassador RICHARDSON. I think, Senator Pell, that the Conference will adopt a treaty at the end of the New York session whatever may be the position of the United States at that time.

Senator PELL. I would agree with you.

Ambassador RICHARDSON. I think that we can have achieved some substantial improvements in the text in the meanwhile, if we pursue that objective in the specific and concrete terms to which Ambassador Learson has referred. I would hope that the Conference would make such changes in any case for the reason I touched on a moment ago, namely, that they would be improvements in the economic viability of the regiment from the standpoint of any prospective investor whether United States or foreign flag.

At this point, I have to express a degree of reservation about the last point made by Ambassador Learson. The United States has a substantial degree of negotiating leverage. The Conference could clearly prefer a result which the United States could support. But the clearer it becomes that the major Western industrial nations, including Japan, are likely to support the treaty with or without us, the less basic is their need for us.

The Conference leadership, therefore, including the leadership of the Group of 77, are facing the question basically, how much is U.S. support worth to them, U.S. participation?

The answer to that, I think, is it is worth quite a lot. But is it worth enough to be willing to make quite specific changes, improving the text within the framework of the basic compromises heretofore reached but not enough to go back to the beginning and to alter fundamentally the structure of these compromises?

Now, you may say why should a former U.S. negotiator be giving quite such a bald picture of the prospect that would exist ex-United States participation or without United States participation. The answer to that is I think we are no longer in a situation in which tactical maneuvers are going to help us much. We are facing a situation in which the Conference can conclude and is simply seeking to decide how much it is necessary to do in order to improve the prospects of eventual U.S. ratification.

Senator PELL. That was not my question. My question was a request that you sketch out for us a scenario of what would happen to American seabed mining interests if no treaty were signed, and what would be the impact on the United States if the treaty were signed, but not by the United States.

Ambassador RICHARDSON. If the treaty goes into force without the United States, as I said in my opening statement, I think the result would be that the deep seabed mining industry would become a foreign industry and U.S. consortium members would operate under the leadership of their Japanese, German, or British partners rather than the other way around. I do not believe that there is any realistic possibility whatsoever that an American company would operate under domestic U.S. legislation alone.

I do not believe, as I said, that there would be a minitreaty. This means, therefore, if the treaty comes into force, the chances, I think, are very large that the United States will participate in deep seabed mining only under foreign flags or if we ourselves join the treaty.

Senator PELL. I have one further question, and then I will turn to Mr. Learson.

What would be the scenario, as you see it, if Kennecott Copper or one of our copper companies wanted to persevere and decided to go it alone without the protection of the treaty. What would be the problems there?

Ambassador RICHARDSON. I think there is no realistic possibility that Kennecott would do that. I think the first thing that would happen to them is they would be open to various strike suits against the board of directors for acting improvidently.

But nevertheless, if they were so stubborn as to move forward and they had enough capital internal to the company so that they did not have to borrow, then the risks they would face would be in the first instance risks resulting from legal proceedings brought in various places around the world seeking to get at assets commensurate with the alleged value of the manganese nodules taken by them from the deep seabed.

There could be the potential of various forms of physical harassment. There would be the legal risks, in any case, arising out of the freedom of any other deep seabed mining operator to operate in the same area—and there is no dispute as a legal matter as to the right of any such company to do that. Finally, there would be likely at the end of the road an adverse judgment by the International Court of Justice.

Senator PELL. Ambassador Learson.

Ambassador LEARSON. I would address that question very directly. We hear quite frequently of the danger of American industry operating under foreign flags. I do not think that this is likely. The problem is if the United States is not a party to the treaty, then other industrial nations will have to face up to the same things that we do not like in this treaty.

They will have to live under those conditions. Those conditions that we are discussing and that I have mentioned, are just as inimical to them as they are to us.

I do not think financing will come easily for foreign corporations to operate in an unstable authority. So that the treaty must be cleaned up first. There would be little mining. That would be my reaction.

Ambassador RICHARDSON. I would like to add a word to that, please. It is quite possible that the conclusion, if there are no significant improvements in the text, would be no mining, period, except for the degree of importance attached, particularly by the Federal Republic of Germany and Japan, to the opportunity to gain access to deep seabed minerals from the standpoint of improving their own security of supply of these metals.

That means then that they could through domestic legislation provide what amounts to risk insurance against the worst case possibilities that are pointed to as criticisms of the treaty regime.

If they do this in one form or another, they can then induce investments that would not otherwise take place. And since their interest in doing that is greater than ours is because we have access to secure sources of Canadian nickel, because we have domestic sources of copper, and because we can stockpile manganese, then the result is a situation in which the mining industry would go forward under those flags.

And I think that is quite likely. Indeed, these other governments are thinking along very much these lines, as evidenced by the fact that we were never able to get anywhere with a ban on subsidy as an alternative to a production ceiling. That, I think, is the realistic ex-treaty scenario.

Senator PRESSLER. That answers a question I was going to ask, if my colleague would yield. You might be able to build a scenario in which there would be more rapid mining development without a treaty. There could be an informal working agreement or agreements, say, between Germany, Japan, the United States, and Russia, just to insure that the great maritime powers or the people who can afford it can go ahead and mine. Mining might actually happen faster than waiting for a treaty.

If it became obvious that we were not going to work out a treaty, could that not be a scenario also?

Ambassador RICHARDSON. I do not think so, Mr. Chairman, for reasons I have very briefly touched upon. These other countries have interests in the treaty broader than deep seabed mining, including interests arising out of their relationships with the Third World.

But I think there is no realistic possibility whatsoever that the Soviet Union would join in any regime outside the treaty, partly because of the priority it attaches to the navigational provisions, partly because the Soviets would see the opportunity to embarrass the United States in a situation in which we were not in the treaty and they were, partly because they do not have an urgent need of access to the minerals in any case, and are legally in a comfortable position to overcome any problems that might give pause to a private investor.

In the case of Great Britain, various other interests would take priority over deep seabed mining, particularly the provisions of the treaty with respect to security of access to the oil and gas in the Continental Shelf. The British already have made clear that they were prepared to take the treaty as is.

The Japanese and the Germans would be delighted to get the treaty improved along the lines sketched by Ambassador Learson. But I think they would regard the risks from the business point of view of operating outside the treaty as being at least as great as those under the treaty. And the alternative would cost them other benefits, including strained relations.

So, therefore, for these reasons, as I previously have said, I do not believe that there is any realistic possibility of a little combination of industrial companies operating outside the treaty.

The far greater probability at this stage is if the United States does not join the treaty, we will be alone, and in that case then none of our companies would take the risks of operating under unilateral domestic legislation.

Senator PRESSLER. Thank you for yielding, Senator Pell.

Senator PELL. I have one other question, which I will address to Ambassador Learson: Why do you think the transfer of technology is no problem for the deep seabed miner?

Ambassador LEARSON. The provisions of the treaty which cover technology refer to mining in the sea, not the offshore processing technology. The former is, in my judgment, the lesser of the two tech-

nologies involved. It is not that it is not important, but it is the lesser of the two, both from an investment viewpoint and from a technical viewpoint.

On transfer of technology—just let me give you a quick rundown of my background. My former company, for example, has huge amounts of investments in both technology and patents.

In patents we license everyone, we cross-license or we do it for a fee. That is giving out technology in a big way. Our program software that we put out, on which we spend over half a billion dollars a year, is also licensed. It is available all for a fee.

Regarding semiconductors, we do great work in that area in our research lab. When we turn it over to a semiconductor company to manufacture devices, after 12 months they can use it to sell to anyone. For other vendors, we often do the same thing on many of our technological items. After a year or 18 months of making it for us, they are free to use it to sell to others.

A lot of companies make a business of selling technology, and I will name two: GE sells not only the technology, but the training and the whole recipe book. RCA does the same thing.

And there is another point. We make tremendously technical products—12 to 18 months is all that is required for reverse engineering to duplicate these products, despite the high technology involved. This certainly would apply to the technology used by the miners.

So it is a way of life that they have learned to live with, and as long as they get good commercial rates on it, it would be no problem, clear up to the other items that I mentioned. And I think the issue was a nonissue.

Senator PELL. Thank you.

Senator PRESSLER. Congressman Bedell, would you like to ask some questions?

Representative BEDELL. Thank you, Mr. Chairman. I appreciate your willingness to let me participate on the Senate side.

Mr. Learson, I want to commend you in regard to your statement. It has always been my contention that both sides are making a big issue out of transfer of technology, to a great extent because of the arguments you have made.

By the way, I think they apply to both sides, because I think that technology is available for purchase for most anybody who wants it anyway as long as it is in the minds of individuals.

I also appreciate very much your testimony, Ambassador Richardson. You and I have had some minor disagreements at times, but I want everyone to know that the job you have done in these negotiations has been tremendous. You are extremely well regarded by all of the people who have participated in those negotiations. And because of that admiration that exists for you, in my opinion, you are in a position to obtain concessions which probably could not be obtained by anyone else.

I guess the concern I have, Mr. Chairman, is that as we do go to what is likely to be the final session, that we would not fool ourselves and that we would recognize the realities of what can be accomplished and what probably cannot be accomplished.

I think we suffer in the United States by failure sometimes to recognize that we cannot always have exactly what we might want. I live

as an individual. I have to abide by laws which I feel should be changed. But I have to do that in order that we might have law and order in our society.

I just came from a meeting with the Governor of Iowa and some people from that State. There are some changes taking place as the result of our budget changes that certainly the State of Iowa would prefer would not be that way. But to have law and order in our society, I think that they accept that they have to do that.

I think we are a long way from coming to that realization in our country. I think it is becoming more and more true as we find the leveling of, if you will, the power of all countries, to no small extent because of the change into the nuclear age.

I guess the concern I would have as we look at this particular issue is that we recognize that reality, and second, that we recognize what I perceive to be the reality which is that there are a lot of other issues in the world besides these Law of the Sea negotiations. If we are going to live as a citizen in the world, then it makes some difference as to how we appear to the eyes of the rest of the world.

I fear that if we continue with what appears to me to be some of the arrogant attitudes that I believe our foreign policy has taken on recently, it will adversely affect both our opportunity to win friends and have influence in the world and, second, the opportunity for world peace.

Mr. Chairman, I believe these negotiations are extremely important, and I believe our attitude in these negotiations is extremely important. I believe the attitude of the Senate is going to be crucial in recognizing the importance of trying to bring peace to the world and involve ourselves properly in these negotiations.

I have not been acquainted with your work, Ambassador Learson, as I am with Ambassador Richardson's. But I want to commend you both for the work you have done in trying to bring this forward as far as you have.

Thank you, Mr. Chairman.

Senator PRESSLER. Gentlemen, we thank you very much. We very much appreciate the time you have spent here today.

We have another panel of witnesses. I will announce that immediately following the conclusion of this hearing, we will have a confirmation on two high-level U.S. officials. One is an Ambassador, and the other is an official in the administration.

For the next panel I will proceed on the 5-minute rule, if that is possible. Let me call forward the next panel at this time.

Ambassador RICHARDSON. Thank you very much, Mr. Chairman.

Ambassador LEARSON. Thank you, Mr. Chairman.

Senator PRESSLER. Thank you.

Our next panel consists of Northcutt Ely, counsel to Deep Sea Ventures, a seabed mining consortium; Myron Nordquist, former U.S. alternate representative to the Law of the Sea Conference; Lee Kimball, executive director, Citizens for Ocean Law; Adm. William C. Mott, Council on Economic and National Security of the National Strategy Information Center; and William Coffey, chairman, Subcommittee on Maritime Industries of the Law of the Sea Advisory Committee.

Gentlemen; we will submit your statements into the record. You can each use your genius in summarizing to give us a 5-minute synopsis. We used to have the 5-minute rule in the House when I was there. Do they still have that?

Representative BEDELL. Yes, they do.

Senator PRESSLER. That is a very smart rule. You boil your statements down to 5 minutes over there, do you not?

Representative BEDELL. Yes, sir, we are required to. We also limit our questioning to 5 minutes.

Senator PRESSLER. That is right. I remember.

So if no one is offended, we will hear from each of you. Let us start with my former colleague, Myron Nordquist, if that is agreeable. Or we can proceed in any order that you wish. Is that agreeable to everybody?

STATEMENT OF MYRON NORDQUIST, FORMER U.S. ALTERNATE REPRESENTATIVE TO LAW OF THE SEA CONFERENCE, APPEARING ON BEHALF OF ROBERT B. KRUEGER, CHAIRMAN, SUBCOMMITTEE ON INTERNATIONAL LAW AND RELATIONS OF THE ADMINISTRATION'S LAW OF THE SEA ADVISORY COMMITTEE

Mr. NORDQUIST. Thank you, Mr. Chairman. It is a pleasure to see you here today. I recall about 10 years ago, when you were in the office of the legal adviser in the Department of State and we had the opportunity to discuss many of these same issues that are before us today.

Senator PRESSLER. They are all the same, are they not?

Mr. NORDQUIST. There are great similarities.

Mr. Chairman, for the record I submit the statement that I am presenting here on behalf of Robert B. Krueger, who is the chairman of the Subcommittee on Internatioanl Law and Relations of the Administration's Law of the Sea Advisory Committee. I will only make a couple of comments about the negotiating process, if I may.

There are two points that I suggest. The first is concern with the window of opportunity. The last Conference was a very unusual affair, because for the first time the United States was not in the forefront of resolving issues but was in the forefront of holding back further development of a draft convention.

The forebearance that was shown by the other participants at the Conference was in some respects remarkable. Certainly, one of the reasons for that forebearance was the genuine desire to have the United States become a party to this convention.

With respect to the window of opportunity notion, I would like to suggest that the United States has a chance, because of what occurred last month, to have its changes made, a chance that would not have existed had the United States not taken such an unpopular stand.

The second major point is that I think the United States needs to have the best leadership in order to capitalize on what I see as a very narrow window of opportunity. I think we need to have a delegation that is respected and experienced. And I think we need to have a delegation that is able to provide balanced advice across the board to the head of delegation.

Mr. Chairman, I would just like to reiterate the two main points without attempting to discuss substance; namely, that the United States has an opportunity. It has paid a great deal to get that opportunity, and we need to have leadership that is capable of exercising the only realistic option that the President has—to go to the negotiations and to do the best we can. With or without a U.S. involvement in a treaty, there will be a treaty and we will have to live with it.

So the United States has really no choice. It must go and do the best that it can to make that treaty one that is as good as it can be in light of U.S. interests. Whether we become a party to it or not is quite another matter.

Thank you.

Senator PRESSLER. Thank you very much. That is an excellent statement. You know, I am going to have to write to that fellow who writes in the Sunday New York Times and ask him where the "window of opportunity" and the "window of vulnerability" are. I will have to get a new vocabulary here. That is good.

Our next witness is Lee Kimball, executive director of Citizens for Ocean Law.

[Mr. Nordquist's prepared statement follows:]

PREPARED STATEMENT OF MYRON NORDQUIST ON BEHALF OF ROBERT B. KRUEGER

Mr. Chairman, we are pleased to appear before your Subcommittee today to testify on the law of the sea negotiations. I am accompanied by Myron H. Nordquist, my partner in the Washington, D.C., office of our law firm, Nossaman, Krueger & Marsh. We have followed the law of the sea negotiations for a number of years from both professional and personal standpoints.

The United States has had a position of leadership in the law of the sea since the 1960's. The Marine Resources and Engineering Development Act of 1966 created the Commission on Marine Science, Engineering and Resources (the "Stratton Commission"). After three years of study, the Commission issued through Vice-President Hubert Humphrey its report, "Our Nation and the Sea." The report recommended an international regime for the deep seabed and a "trusteeship" or "intermediate" zone between the area clearly given to national jurisdiction under the 1958 Geneva Convention on the Continental Shelf (i.e., 200-meter isobath) and the outermost limit of the continental margin (i.e., base of the continental slope).

It was commonly perceived just a few years after the four Geneva Conventions of 1958 became effective that they were inadequate to deal with the broader oceans issues then emerging. The questions included: offshore boundaries for oil development, international aspects of ocean pollution, a regime for newly discovered deep sea mineral resources, assured military and commercial transit through areas that might be closed by a broad scale adoption of 200-mile zones, and the closing of international straits through the adoption of twelve-mile territorial seas.

In 1967, the General Assembly considered a resolution by the Government of Malta that would have made the oceans the "common heritage of mankind" and provide for their "exploitation . . . to promote the development of poor countries." The subject stimulated great interest and led to the creation of a U.N. Ad Hoc Committee on Peaceful Uses of the Sea-bed and Ocean Floor Beyond Limits of National Jurisdiction. The Committee met each year thereafter and eventually became the preparatory committee for the Third U.N. Conference on the Law of the Sea which began its work in Caracas in 1974. The Conference has since met typically twice a year for meetings of four to six weeks, the latest of which finished August 28, 1981, in Geneva.

This past session was a very unusual one in that, for the first time, the United States was not at the forefront in attempting to reach accommodation on the remaining unresolved issues which confront the Conference. Those issues essentially involve deep sea mining and the political organization that would govern

it, the International Sea-Bed Authority. The session ended inconclusively about the prospects for a Convention, largely because the Administration decided to undertake a review of the United States law of the sea policy and to defer entering into any definitive negotiations until the review was completed. Prior to the U.S. policy review, the Conference appeared to be on the threshold of reaching final agreement on a Convention text. The U.S. initial announcement of the review had evoked a storm of consternation at the spring meeting of the Conference in New York earlier this year. Doubt began to arise about the prospects to conclude a Convention to which the United States would be a party.

As described by the Department of State, the review is a five stage process. The first stage, which is apparently complete, was to identify the entire range of national interests and objectives relating to the law of the sea. Second, the review identified provisions of the Draft Convention of August 1980 which diverge from the interests and objectives which were identified in the first stage. The third stage was a fact-finding mission, which was one of the primary objectives of the United States Delegation at the Geneva sessions, namely to find out what would be acceptable to other nations participating in the Conference. The other primary objective of the delegation at this last session was to obtain a forum at which the United States could voice its concerns. Fourth, alternatives to a comprehensive convention, presumably with accompanying consequences, are being examined. Lastly, an option paper is being prepared for presentation to the President, probably in mid-October 1981.

The options cannot be attractive. The 1958 Conference was characterized by rather short debates and the adoption with minor amendments of the recommendations of the International Law Commission. This Conference is quite different.

The negotiations have been essentially continuing since 1967 and we do not yet have a recommended document. Portions of the negotiated draft are probably unacceptable to the United States but we cannot deny that the draft is the product of give and take in the longest and most comprehensive international conference ever held. If the United States does not go along with the draft, for whatever reasons, we should at least be aware that we are retreating from positions previously taken, or even initiated, by us.

On August 5, President Reagan's Special Representative to the Third United Nations Conference on the Law of the Sea, Mr. James L. Malone, addressed a Plenary session of the Conference. Mr. Malone told the Conference that "the people of the United States, through their electoral process, have expressed their preference for a wide variety of policies that affect the work of [the] Conference." He said that U.S. leaders "cannot and should not ignore that mandate." His statement also expressed some of the Administration's concerns with the Draft Convention, all of which centered on deep sea mining in the area beyond limits of national jurisdiction.

In response to the U.S. Representative's statement, Inam Ul Haque of Pakistan, the Chairman of the Group of 77, spoke to the Plenary session of the Conference on August 10. He said that "[a]ny objective examination of the process of [the] negotiations will clearly indicate a constant erosion of the positions of the Group of 77 (120 countries). The developing countries are now left with the 158–160 countries barest minimum and are placed in the most vulnerable position and are themselves in the greatest need of assurances and safeguards." The statement of Inam Ul Haque was indicative of the attitude of many of the developing countries at the Conference:

> The United States has declined to be specific. It has made a very general statement containing vague recriminations, excessive apprehensions and a nebulous mass of considerations, mostly internal. It has raised a host of issues both of principle and substance, and despite the dexterity of its camouflage conveys the clear message that not only is the United States not prepared to negotiate at this stage, but that it intends to reopen, at some later stage, issues of principle as well as substance certainly on the [seabed mining provisions] and perhaps on others.

As one of the primary missions of the U.S. delegation to Geneva was to find out what was negotiable, the United States stood firm on the position that it wanted to discuss each issue individually on its merits. The Group of 77 insisted that this stance was inconsistent with the concept of the convention as a "package" of compromises. Both sides were unwilling to change their positions and the session ended without a meaningful dialogue about what might be acceptable to the United States.

The session was marked by the emergence of a significant gap between the two positions on the substance of the deep seabed regime. Essentially, substantive negotiations were brought to a halt. Agreement was reached that the next Conference text will be an official draft Convention, which can only be amended after consensus negotiations are complete. Consequently, the door was left open to negotiate with the United States. The idea was apparently intended to keep the United States involved in the Conference while continuing to move towards the signing of a Convention in Caracas in 1982.

Basically, three options are available for presentation to the President in mid-October: to withdraw, to accept or to negotiate. The first option is that the United States could simply withdraw from the negotiations. In this event, a convention will be finalized in 1982 without the U.S. signature.

It is difficult to see any advantages to the withdrawal option. After all, the United States is a sovereign entity that participates in world affairs on a continuing basis, regardless of which political party is in power. Isolation from the international community on such critical issues involving such a significant and strategic portion of the globe can serve no Administration's interest. In addition, we should remember that the United States was the driving force behind the commencement and continuance of the law of the sea negotiations, starting with the Johnson Administration and continuing with equal, if not greater, vigor through the Nixon, Ford and Carter Administrations. Indeed, the seminal ideas for the structure and functions of the deep Seabed Authority and related organs which the Reagan Administration now finds so objectionable were, in fact, proposed by the United States in a working paper submitted to the United Nations in 1970 based on recommendations from "Our Nation and the Sea." Ironically, some of the principal authors of those ideas are among the most influential advisors to Mr. Malone. This is common knowledge among the leaders of the Conference and has added to the confusion and frustration that have been evident. Yet, we cannot accept the draft Convention in its present form.

The only realistic option appears to be for the United States to return to the negotiations with the purpose of maximizing its major interests as identified in the review. We can gain by negotiating; we will gain nothing by not negotiating. This means that we must instruct and prepare a team for negotiation in the very near future. After all, much of the important work with other nations must be done before the Conference reconvenes. This lead time is necessary to implement whatever policy position is taken.

Paradoxically, or perhaps not so paradoxically in light of the politics of the United Nations, the change of government in the United States, the abrupt change of our representatives and approach, and the atmosphere of the review process have given the United States bargaining initiatives that it has lacked since its abortive 1970 trusteeship proposal. World leaders in both industrialized and developing countries perceive that a convention adopted without United States participation could be a strong deterrent to ratification. Even if ratified without United States participation, how viable is such a new international ocean's order?

We have, therefore, a brief window of opportunity for useful negotiation; a window that has been deliberately left open for the accommodation of U.S. interests. The window, however, will begin slowly to close if we do not take advantage of it with some alacrity prior to the spring 1982 meeting scheduled for New York. We must begin negotiations with key conference leaders immediately—and follow with well-designed specific and tenaciously pursued initiatives in that session. If we do not—if we continue to follow an introspective and passive approach to the Conference—we could well find ourselves with a widely-accepted Convention, which we will have missed the chance to improve.

The Convention is scheduled for signature/adoption in Caracas in the fall of 1982 and many expert observers believe that this timetable will be met. The pressure to conclude this Conference comes not only from the developing countries but also from a number of others, including the Soviet Union, whose interests heretofore have been quite consistent with ours. The remainder of the Group of Five (U.S.S.R., United States, Japan, France, and the Federal Republic of Germany) have been, at best, merely sympathetic to our review approach. Though we actively participate further in the Conference and sign the Convention at Caracas, the United States will not be bound until it is considered by the Senate and ratified by the President. Even if the Convention is unacceptable, we should devote our best efforts to improve it and make it acceptable. We may have to live with it.

The consequences of the United States not becoming a party to a convention vary according to whether there is a convention at all and how many other States, and which ones, become parties. The conception of this Convention as a "package deal" could result in foreign governments asserting their rights to control freedom of navigation and enforcing maritime limits more vigorously to demonstrate their anger with the U.S. rejection. Other States might simply want to take advantage of the resultant confusion. Such a response can only lead to conflicts similar to the recent clash over the Gulf of Sidra where United States aircraft overflying the high seas were fired upon, because the Libyans illegally claimed the area, asserting that their sovereignty was being violated.

The confusion as to what the law of the sea will be in particular ocean areas will be a major problem if the Conference ends with no convention. The customary law of the sea is presently difficult to ascertain in many instances as it is based on divergent State practice. If a convention is not concluded, questions such as the breadth of the territorial sea, the legality of exclusive economic zones, the freedom to mine deep seabed resources and to exercise freedom of navigation, especially through straits, could become major points of contention with recurrence of the Gulf of Sidra type of conflict.

In the late 1960's and the 1970's, we were concerned with these issues, much more so than with the strategic minerals of the deep seabed that seem to have recently preempted our approaches on the subject. In a June 23, 1981, letter to Special Representative James L. Malone, Senator Henry M. Jackson recaps these concerns:

> As I am sure you are aware, I have supported the Administration's decision to review U.S. policy on the Law of the Sea. However, I am somewhat concerned about the timing for completion of the review. If the United States is not willing to engage in substantive negotiations at the Geneva session in August, there is the possibility that the developing countries would agree to a treaty without the United States. While this is not, in my view, highly likely, if it did occur our position would be very difficult.
>
> I am also not entirely satisfied that the national security interests relating to navigation and overflight which were the original impetus for U.S. involvement in the Law of the Sea process are being given the weight I assume we still think they deserve vis-a-vis deep seabed mining. As you may be aware, I have asked Chairman McClure to schedule a closed hearing with representatives of the Departments of Defense (including the Joints Chiefs) and State, to get their current assessment of the national security value of the draft convention's provision and their assessment of the impact of no treaty on our defense capability.

The question of rights to mine the resources of the seabed will be of major importance if the United States does not sign a convention, especially if a convention is signed by most other States. If an International Sea-Bed Authority is formed without the United States, it may be difficult to commence mining outside of the Authority's regime. The international law arguments are complex. But, a respectable case is being forcefully made that the "common heritage of mankind" has become, or on the entry into force of a Convention will become, part of customary international law. The "common heritage of mankind" concept is expressed in a United Nations General Assembly Resolution unanimously approved in 1970. This statement of principles reads, in part, as follows:

> 1. The sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction (hereinafter referred to as the area), as well as the resources of the area, are the common heritage of mankind;
>
> 2. The area shall not be subject to appropriation by any means by States or persons, natural or juridical, and no State shall claim or exercise sovereignty or sovereign rights over any part thereof;
>
> 3. No State or person, natural or juridical, shall claim, exercise or acquire rights with respect to the area or its resources incompatible with the international regime to be established and the principles of the Declaration.
>
> 4. All activities regarding the exploration and exploitation of the resources of the area and other related activities shall be governed by the international regime to be established.

If the United States is to exercise and maintain its historic role of leadership in the law of the sea, it should act now. We, and the other nations of the world, have a stake in the new order of the oceans. If we are to reestablish our traditional role of respected leadership, we should move decisively and with clarity of purpose. The window of opportunity is closing.

Thank you for allowing me to present my views.

STATEMENT OF MS. LEE KIMBALL, UNITED METHODIST LAW OF THE SEA PROJECT

Ms. KIMBALL. Thank you, Senator Pressler. I appear here today on behalf of the United Methodist Law of the Sea project, which has worked for over 6 years in public education on Law of the Sea issues and with the U.S. Congress and at the Conference. I note that I am listed as a witness for Citizens for Ocean Law, and while the projects share several goals, I am not expressly representing them today.

I have been asked to address broad U.S. interests in an oceans law treaty, and I find myself repeating many of the things that have been said before. I think most important at this point would be to put the questions being raised about the treaty back into the context of the negotiations and the current tenor of those negotiations.

And I think the former speakers have quite adequately expressed the view that there will be a treaty concluded next year, and the real question is whether or not the United States will be party to that treaty.

I think the determination to conclude it was very strongly expressed at the summer session in Geneva. I think U.S. interests in the United Nations oceans treaty go beyond those of oceans interests. Our refusal to participate in the UNCLOS forum calls into question our reliability in negotiations generally, and it would tarnish our image of favoring law as a basis for relations among nations. This could erode public support for U.S. foreign policies and could well be self-defeating with respect to other U.S. foreign policy goals.

And I quote one Third World newspaper on the subject, which said:

> A predilection for gunboat diplomacy at the expense of international conciliation will as sure as anything deliver a number of Third World states to the U.S.S.R.

In my testimony I have summarized various U.S. interests and the benefits we get from a comprehensive oceans treaty. I would rather turn today to what the alternative could be if the United States were not party to this prevailing international ocean law under a comprehensive regime. I have mentioned several situations which might arise in the national security area of navigation and overflight. I do not think I need to repeat those, if I am trying to summarize this in five minutes.

I think the members of this committee are more than aware of how difficult an approach through a series of bilateral and multilateral agreements would be. These very time-consuming, complicated negotiations could involve concessions of a political, economic, and military nature. The bilateral approach is also a much less durable means of pursuing our ocean interests and one more subject to the pressures of day-to-day events.

With respect to the alternative to a legal regime, a comprehensive legal regime for deep sea mining, I do not see any more favorable outlook under a bilateral or multilateral approach than I do in the national security area. And I have yet to hear a mining company representative state that a private company would be able to obtain the investments required and proceed with mining solely on the basis of domestic law. Whether they would do so under a limited multilateral regime has also certainly not been demonstrated.

Previous speakers have said that the mini-treaty idea is not a very realistic one. I would certainly agree. It seems unlikely that we could have the bulk of the world's nations going forward in a maxi-treaty and the industrialized mining states going forward with a mini-treaty. The willingness to conclude a comprehensive oceans treaty is fairly strong at this point.

The more likely scenario would be the one where the developing countries, joined by a number of the industrialized mining states, signed a treaty along the lines of the present one and the U.S. mining industry would move abroad.

It has also been suggested in the past that the government could get into a risk-insurance scheme, I think, along the lines that you just mentioned, Senator Pressler. It would seem that that insurance scheme would be much less costly if we had a comprehensive oceans treaty with limited risks which that scheme could ensure against, rather than a situation where a maxitreaty and a minitreaty set up two competing legal regimes.

How important are the national security and navigation and overflight issues vis-a-vis deep sea mining? If one believes that impediments to oceanic transit rights represent a more serious and categorical threat to U.S. interests than impediments to U.S. access to the seabed minerals, then one would be reluctant to tamper with the precarious balance of the existing text.

Even if one assigned the same priority to national security concerns in navigation and overflight, and to those for U.S. seabed mineral access, it would seem that the alternatives in both cases to a comprehensive legal regime are much less favorable than the regime itself. One would argue then that U.S. interests would be best served by continued participation on the UNCLOS–III Conference next spring. We would then respect the admonitions of our allies and those from the Eastern European and developing nations against seeking fundamental changes in treaty provisions on seabed mining.

We have already been informed in no uncertain terms that while some flexibility remains to accommodate a short and reasonable list of changes, these nations will tolerate neither rejection of the basic compromises in the existing text nor continued delay.

The U.S. would help its case significantly at the negotiations next spring if President Reagan were to issue a statement of commitment to the treaty negotiations once he makes his decision and to give his full support to a respected and high-level delegation for the final decisionmaking session.

He should also indicate U.S. support for such basic principles in the negotiations as the parallel system and some form of international regulatory machinery and revenue sharing.

We would also improve prospects for achieving U.S. objectives if we clearly placed completion of a reciprocating states regime in a subordinate position to the successful conclusion of the international negotiations.

In view of the limited 3-week period set aside for actual negotiations next spring, it would be important for the United States to identify priorities among the changes we would like to see, possible trade-offs which would enhance their chance of acceptance, and strategies tailored to achieving them.

If adequate groundwork is to be laid for that spring session, the Government should engage in serious consultations to explore these possibilities with allies and other members of the Conference.

The United States should also be willing to pursue clarifications and understandings on some of our concerns in lieu of an actual language change where that might be inappropriate.

Consultations with our allies leading to agreement on a limited list of reasonable changes would enlist their help to help us. But if the United States does not take advantage in the next 5 months to rebuild bridges to final agreement, we may well have no choice but to accept an agreement completed without our final input or remain outside international ocean law.

Thank you.

[Ms. Kimball's prepared statement follows:]

PREPARED STATEMENT OF MS. LEE KIMBALL

I appear today on behalf of the United Methodist Law of the Sea Project, sponsored jointly by the Board of Church and Society and the Board of Global Ministries of the United Methodist Church.[1] For over six years the Project has been involved in public education on matters before the Third United Nations Conference on the Law of the Sea and has worked with the U.S. Congress and at the United Nations meetings. Our over-riding goal has been to promote the establishment of an equitable and durable legal framework for ocean use and development—one which protects human health, safety and the marine environment and conserves the ocean's living resources, and one which promotes conflict avoidance and peaceful dispute resolution. In our view, a universally-agreed international oceans treaty is the best mechanism to achieve this goal.

I have been asked today to address broad U.S. national interests in the United Nations Conference on the Law of the Sea. Any such assessment must look both at how well the existing provisions of the Official Draft Convention meet U.S. national interests in ocean law and at alternatives to the international regime, a process the Administration has been going through for seven months now. I have no desire to second-guess the outcome of that review. What seems more useful at this time is to put the review back into the context of the on-going negotiations and to examine the situation the U.S. would find itself in if President Reagan opts out of the negotiations. That analysis must take into account what prevailing international ocean law will be if the United States does not participate in the UNCLOS treaty; that is, whether an international oceans convention along the lines of the present draft will be in force for the majority of the world's nations but not for the United States, or whether a series of more limited bilateral and multilateral agreements will supersede the existing array of national ocean laws.

The determination to conclude and adopt a law of the sea convention with or without the United States—preferably with the United States—was reaffirmed by virtually every delegation by the end of the August law of the sea meetings in Geneva. Thus, the United States may be fairly isolated if we refuse to accept the final treaty. Moreover, whatever the prevailing law, the United States' reversal on law of the sea policies will not be quickly forgotten by foreign nations and will leave this country, in particular, more open to challenges to our ocean activities.

U.S. national interests in an oceans treaty go beyond our marine-related activities to general foreign policy considerations as well. Eight years of negotiations have produced a text which balances the national ocean interests of over 150 nations. These negotiations were conducted in good faith by all participants and the provisions were agreed according to consensus principles. Any changes introduced at this point must be found to offer "a substantially improved prospect of a consensus", based on widespread and substantial support prevailing in the plenary body of the conference. The United States has already been widely accused of lack of good faith in the negotiations, due both to the

[1] Under its Director, Barbara Weaver, the Project has established 11 regional programs. These draw on a country-wide network of over 200 United Methodist "resource people" trained in Law of the Sea questions.

types of objections raised by the delegation to texts considered generally acceptable and to our seeming rejection of the consensus principles per se. Continued refusal to participate in the UNCLOS forum would call into question our reliability in negotiations generally and it would tarnish our image of favoring law as the basis for relations among nations. This would erode public support for United States policies and could well be self-defeating with respect to other U.S. foreign policy goals. To qoute one Third World newspaper on the subject, "a predilection for gunboat diplomacy at the expense of international conciliation will as sure as anything deliver a number of Third World states to the U.S.S.R."

The pursuit of the U.S. national security will always entail some mix of law—based on mutual accommodation and consensus—and the use or threat of force. But the more often we can establish in law a set of shared assumptions over norms and procedures, the more we improve the starting point of our relations with other nations and the less energy we will have to expend in reacting to disagreements on an ad hoc basis. Accommodation and consensus form the basis of a predictable and peaceful world environment. The breakdown or denial of concensus drives us toward greater reliance on force and harbors greater potential for disputes escalating to armed conflict.

In summary, U.S. national interests in the Law of the Sea negotiations include:

The establishment of a stable legal regime for two-thirds of the Earth's surface and compulsory recourse to peaceful dispute settlement procedures for virtually all oceans-related disputes;

Arresting the array of national claims to ocean areas and rights which could adversely and unexpectedly affect U.S. ocean activities, in favor of a uniform and agreed set of rights and responsibilities on the part of all nations;

Guaranteed global transit rights for aircraft, surface and submerged vessels;

Internationally-sanctioned rights and responsibilities with respect to fish, oil and gas resources development;

A favorable balance struck between coastal states' rights to protect their shores from pollution caused by vessel passage offshore and restrictions on the ability of coastal states to arbitrarily impede vessel passage;

The creation of a stable and workable international legal regime for the development of seabed resources beyond national jurisdiction;

The establishment of a framework for the protection of the marine environment and a call for the further development of marine environmental laws to protect the ocean from all sources of pollution and hazardous materials;

Progressive steps toward conservation of the ocean's living resources and protection of marine mammals; and

A presumption in favor of cooperative and predictable relations with other national users of the world's ocean.

Treaty provisions on questions of navigation rights, marine scientific research, jurisdiction over offshore fisheries and continental margin oil and gas development, environmental and marine mammal protection, and dispute settlement command broad support within their respective constituencies in this country. While these provisions may not be perfect, their constituents recognize that without internationally-recognized rules, their interests would be less well served.

Criticisms of the treaty today tend to downplay the benefits of an agreed legal framework for the conduct of these ocean activities and juxtapose national security benefits in navigation and overflight against those relating to U.S. access to strategic and critical materials in the international seabed area. There is a feeling within the current Administration that we may be sacrificing too many of the latter for the former. But let's take a look at what might evolve in these two areas without internationally-agreed rules.

In the national security area, one need only turn to recent events off Libya to identify situations where international treaty agreement backs up the U.S. case. Neither the 1958 treaties nor the UNCLOS III Convention provide any basis for Libya's historic bay claim, and the UNCLOS III Convention, by stabilizing territorial sea claims at 12 miles, would reduce the number of legal questions at issue. This event was ironically foreseen in the U.S. delegation report on the spring meeting of the United Nations Conference, which referred to statements made by various delegations which "constituted a clear indication that many coastal

states delegations were ready and willing to do battle on a number of military-related issues should the text be re-opened." Not only did 40 or so nations raise the question of prior notification or authorization for the passage of warships through territorial seas, but Brazil argued that the text should be revised "to make clear that it does not authorize military exercises in the exclusive economic zone without the authorization of the coastal state." Libya's action in protest against American naval maneuvers would exhibit strong support for a similar revision absent any legal questions about the extent of the country's territorial jurisdiction. Other nations may push for related revisions.

It has been argued that the United States could protect the mobility of its military and commercial fleets and aircraft through a series of bilateral and multilateral agreements. Yet it is probable that the political, economic and military costs of negotiating a number of satisfactory agreements would far outstrip the costs and concessions involved in the UNCLOS III agreement. In 1979 alone, the U.S. Government agreed to pay the Philippines $500 million over the subsequent 5-year period for base rights there.

Members of the Foreign Relations Committee are eminently familiar with the difficult and time-consuming nature of bilateral maritime negotiations with our immediate friends and neighbors to the north and south. Pursuing similar negotiations with coastal nations—friend and foe alike—would magnify the complications 100-fold.

Moreover, the bilateral approach is a much less durable one—as witness the recent fate of our access to monitoring and other facilities with the change of government in Iran—and one more subject to the pressures of day-to-day political events—as when Spain denied the United States use of our air bases there for re-supply of Israel during the 1973 Middle East war.

Additional questions arise when the appropriate response to a disagreement over prevailing law is not at all clear-cut. For instance, if Indonesia closes the Strait of Malacca to supertankers following numerous pollution incidents, are we going to attack the country? If we ignore the challenge and steam on through, how will we affect Indonesia's attitude to passage of other commercial and military ships? How long will it take to solve the problem diplomatically, and how many millions of dollars might be lost by oil and shipping companies in the process? Will the United States lose the benefits of sealanes passage through the Philippine archipelago, if we do not participate in the UNCLOS III Convention, while the Soviets take full advantage of it?

The automaticity of guaranteed legal rights which cannot be denied either randomly or in times of crisis not only reinforces our own security; it also signals to our allies and adversaries that the United States can be counted upon to routinely render assistance without having to weigh possible political or economic costs of asserting non-guaranteed rights of transit.

Moreover, as pointed out by three Members of Congress in a June 10 letter to President Reagan, "a bilateral approach . . . would likely sacrifice incentives inherent in a comprehensive treaty for nations to accept a broad range of ocean use standards rather than only those in which they have a particular interest." Thus, not only would the United States have to expend far vaster energy and capital in pursuing our interests on a piecemeal bilateral or multilateral basis, but we could also lose the benefits of other nations' adhering to minimum legal standards and obligations to protect the marine environment, conserve fish, facilitate offshore passage and the conduct of marine scientific research, or resort to peaceful dispute settlement procedures.

Regional marine conflicts to which the United States is not directly a party can nevertheless have an indirect effect on U.S. interests. Agreed international law could reduce or eliminate these tensions. For instance, the dispute between Iran and Iraq one year ago was seen as a potential threat to international commercial tanker transit through the strait of Hormuz at the mouth of the Gulf. Continued feuding between Greece and Turkey over Aegean Sea claims does nothing to strengthen the NATO alliance, and Libyan-Maltese seabed boundary disagreements continue to heat up the Mediterranean. Additional conflicts over boundaries, fish and oil all contribute to world instability and reduce our ability to orchestrate a cohesive regional response to what this Administration may view as far greater threats to world peace.

Finally, the United States should not be quick to disregard the value of establishing certain automatic rights for the benefit of other nations. Whether Soviet transit rights or those of Thai fishermen, anxieties caused by lack of agreement

over marine rights and obligations could more easily escalate to conflict without an agreed legal framework.

The alternatives to an agreed international legal regime for deep sea mining do not seem any more favorable than those affecting national security considerations. I have yet to hear a mining company representative state that a private company would be able to obtain the investments required and proceed with mining solely on the basis of existing domestic law—based on the 1958 Geneva Convention on the High Seas. Whether these companies will be able to undertake development efforts on the basis of a limited multilateral agreement has never been conclusively demonstrated. The nations involved in the on-going talks among potential seabed mining nations under the reciprocating states provisions of U.S. and West German law have not agreed on an "opening date" for receipt of license applications, even though the U.S. and West German laws authorize exploration licenses to be issued after July 1 of this year. Some among them refuse to execute these agreements before the final decision-making session of UNCLOS III next spring. In their view, reciprocating states arrangements are to be purely interim measures, in effect as well as in intent, and they prefer to operate under an agreed international regime.

If the UNCLOS III treaty discussions prove unable to reach a conclusion satisfactory to the United States or to the bulk of the industrialized mining nations, we would most likely find a "maxi-treaty" adhered to by most of the world's nations and a "mini-treaty" agreed among the mining states but contested by the others. Whatever the final outcome of challenges to the legality of mining operations conducted under the mini-treaty, the threat of company boycotts, assets seized, ore shipments attached and legal entanglements and delay should be enough to deter any but the most imprudent investor.

Under a scenario where the vast majority of developing nations were joined by some of our allies in a comprehensive oceans regime, the more likely scenario at this point, the United States would most likely lose our domestic seabed mining industry to foreign flag operations under the treaty. If one returns to the roots of objection to the present texts—those citing U.S. mineral import dependencies—then it seems that our course would have been self-defeating.

It has been suggested that the risk entailed in mining under a mini-treaty scenario could be insured through a Federal or a combined Federal/private insurance scheme. In the first place, this alternative overlooks both the budget-slashing mood of the present Administration and the fact that well previous to the present mood, the 95th Congress rejected a government guarantee scheme insuring unilateral seabed mining operations against losses due to the entry into force of an international law of the sea treaty.

Second, in the event that the present Administration and the Congress determine that the national interest in a domestic seabed mining industry merits government risk insurance, it would inevitably prove less costly to insure what might be an occasional transgression under an internationally-agreed and recognized legal regime than to construct an insurance scheme to insure companies against legal/political risks which arise when a maxi-regime is pitted against a mini-regime. This would argue for the United States to pursue the best deal it can get in the present negotiations and then, if necessary, to fill in the few uncertainties with a limited risk insurance program, as originally proposed by Ambassador Richardson one year ago.

What are the trade-offs between the national security navigation and overflight issues and the deepsea mining issues? If one were of the view that impediments to oceanic transit rights represent a more serious and categorical threat to United States interests than impediments to U.S. access to strategic and critical materials in the seabed, then one would be reluctant to tamper with the precarious balance of existing treaty texts. In this view, one would argue that the criticality of U.S. access to seabed minerals would be moderated by stockpiling and substitution in situations of temporary supply disruption, that the likelihood of cartels affecting U.S. access to existing supplies of these minerals is not very great, and that the vulnerability of seabed mining operations rules against considering them a secure source.

Even if one were to assign the same priority to U.S. national security concerns with navigation and overflight in the oceans and to U.S. seabed mineral access, it would seem that the alternatives in both cases are less favorable than agreement on a comprehensive legal regime. One would then argue that U.S. interests would be best served by continued participation in the UNCLOS III forum next spring.

Our best course would then be to respect the admonitions from our allies and from the Eastern European and developing nations against seeking fundamental changes in treaty provisions on seabed mining. We have already been informed in no uncertain terms that while some flexibility remains to accommodate a short and reasonable list of changes, these nations will tolerate neither rejections of basic compromises nor continued delay. It would also be self-defeating to jeopardize our relations with our current land-based suppliers of strategic and critical materials by unduly antagonizing them.

The United States would help its case significantly were President Reagan to issue a statement of commitment to the treaty negotiations once he makes his decision and to give his full support to a respected and high-level delegation for the final decision-making session next spring. He should also indicate United States support for such basic principles in the negotiations as the parallel system and some form of international regulatory machinery and revenue-sharing. We would also improve prospects for achieving United States objectives if we clearly placed completion of the reciprocating states agreements in a position subordinate to successful conclusion of the international negotiations.

Given the limited three-week period set aside for actual negotiations during the 1982 spring meeting, it will be important for the United States Government to identify priorities among the changes we would like to see, possible trade-offs which would enhance their chance of acceptance, and strategies tailored to achieving them. If adequate groundwork is to be laid for the spring session, consultations to explore these possibilities should be arranged. It will be critical that these consultations ultimately incorporate a broad and representative spectrum of participating delegations. The United States should also be willing to pursue clarifications and understandings on the concerns we have expressed in lieu of an actual language change where this might prove inappropriate or unnecessary.

Consultations with our allies leading to agreement on a limited and reasonable list of changes will allow us to enlist their help and remove them from the untenable position they now find themselves in, pulled between the United States and the developing nations.

If the United States does not take advantage of the next five months to re-build bridges to final agreement, we may well have no choice but to accept an agreement completed without our final in-put or to remain outside international ocean law.

Senator PRESSLER. Thank you very much.

Senator Helms has arrived.

Senator Helms, let me say that we will try to finish this hearing shortly, and then we will have a confirmation hearing on individuals immediately following.

Do you have comments on either introductory statement?

Senator HELMS. Thank you, Mr. Chairman, but I will pass.

Senator PRESSLER. Next I will call on Mr. Northcutt Ely, counsel to Deep Sea Ventures, a seabed mining consortium.

STATEMENT OF NORTHCUTT ELY, COUNSEL TO DEEP SEA VENTURES

Mr. ELY. Mr. Chairman, let me start out with what I trust will not be regarded as an ungracious remark, but on this occasion, as on others when I have had the honor to appear here, the morning has been taken up by endless presentations without time limitation by those who are opposed to President Reagan's present position and who favor the treaty. Mr. Richardson engaged in an extended apologia for it, and Ambassador Learson, to my surprise and pleasure, pointed out some of the grave defects in this document.

I cannot possibly reply to Mr. Richardson in 5 minutes. It would be an insult to this committee's intelligence if I attempted to, nor do I welcome being placed in the position of being given a prima facie

opportunity to reply as though equal time were granted, when that is not the case.

I have a 10-page prepared statement. Annexed to it is a 30-page detailed analysis of the treaty. If I am compelled to shut up in 5 minutes, I shall do so. But this is not the American way of presenting both sides of an issue.

Senator PRESSLER. I would be happy to give you 10 minutes as far as I am concerned. We do have more time. We do have two nominations following, and during the question-and-answer period perhaps you will have more of a chance. But we are trying to do this with a sense of fairness, and the 5-minute rule is really necessary because of the constraints.

Mr. ELY. I understand. If you would like me to yield my time, I will do it.

Senator PRESSLER. No, I do not want for you to yield your time. I want you to take it. Indeed, as far as I am concerned, if you feel strongly, take more than 5 minutes if you cannot say your piece.

Mr. ELY. I will not trespass on your generosity. I will try to make an adequate presentation.

The opinions that I will state are my own, but as the committee may know, I am counsel for Ocean Mining Associates, a consortium organized to engage in deep sea mining. That group of companies and, indeed, all of the mining companies represented through the American Mining Congress have said emphatically that they would not be able to finance or conduct operations under the terms of the proposed treaty. The most recent such expression is a resolution approved by the board of directors of the American Mining Congress 3 days ago, which I have furnished to the committee.

The Reagan administration is entitled to the gratitude of the American people for its courage for refusing to proceed to the signature of this treaty as the Carter administration had planned to do. The treaty's adverse effect upon the American security of supply of critical strategic minerals is so drastic that the draft agreement should go back for renegotiation no matter how long it takes.

The reasons for this—and I emphasize what I am about to say—the reasons for this have nothing to do with the welfare of mining companies. The companies can and, if need be will, put their money to work in less risky and more profitable projects. But the departure of the American companies, controlled by American law and policies, would deprive the American economy and national defense of their one remaining opportunity to have permanent access to manganese, cobalt, and nickel from sources not controlled by foreign countries or foreign companies responsive to the policies of foreign governments.

A word about these metals before returning to the treaty. This is crucial. Without manganese, not a pound of steel could be manufactured. Without cobalt, manufacture of a long list of items critical to national defense, such as airplane turbine blades, would be imperiled. Without nickel, stainless steel could not be produced.

We are almost totally dependent—99 percent dependent—on foreign countries for all of these, as is indeed the whole free world. We are dependent for 90 percent of our supply of manganese on eight mines

located in five countries. These are: the Republic of South Africa, Gabon, Australia, India, and Brazil.

There have been no major manganese discoveries for a quarter-century. Unless huge new mines are discovered somewhere, it is probable that by the end of the next quarter-century, the United States primary source of manganese will be the Republic of South Africa and the seabed.

I have furnished to the committee a letter to myself from Robert L. L'Esperance, director of resource planning and development of the United States Steel Corp., on this subject.

As to cobalt, the Free World's major supplier is Zaire. The committee will recall that when Cuban troops invaded Zaire from Angola, cutting off cobalt exports for a time, the price soared from less than $5 a pound to $50 or more. As to nickel, while Canada is a major source, more than half of our total supply comes from mines in less developed countries, and this ratio is increasing.

Copper, the fourth major seabed mineral, does not present such an ominous figure, because the United States has large, if low-grade, copper reserves. But environmental constraints are a deterrent to their full exploitation, and the percentage of the American supply coming from foreign countries, now 20 percent, can be expected to increase.

In short, the assurance of continuing accessibility of seabed minerals is vital to the American economy and national defense. These factors control the answer to the question of whether the United States should sign a treaty like the present draft, not the question of whether companies would profit or not.

Now for the reasons why American companies cannot and will not spend a billion dollars per project to go into business under a Law of the Sea Treaty like the present one and why the control of seabed minerals will be in foreign hands if this treaty comes into force.

There are two basic reasons: The treaty would create a political climate hostile to private investment; and its specific provisions would so restrict the usefulness of the investment as to make it unattractive even if the political climate were benign.

The treaty would create a political regime in which control would be vested in the Soviet Union and the less developed countries and in which effective American authority would be minimal, at best. This is because the treaty would put an end to the principle of the freedom of the seas, now applicable to deep sea mining, and supplant it by a concept of ownership and sovereignty, misnamed the "common heritage," vested in a new supergovernment empowered to grant or deny access to the seabed on terms prescribed by the treaty.

Those terms articulate the philosophy of the centrally planned socialist governments, not the market economy of the Free World. The supreme organ of the authority is to be an assembly in which the United States would have one vote among 155 nations. It differs from the Assembly of the United Nations in that the new Assembly would have legislative powers.

Perhaps the clearest measure of the ignominious role of the United States is found in the composition of the Council, an executive agency with limited but important powers. Of 36 seats, the Soviet bloc is assured three by name, the United States is assured none at all. It may

well be elected to a seat from time to time by other industrial nations, its competitors, in rotation with them. Otherwise, it must depend on election as representative of a geographical region described as "Western Europe and others," our country being one of "the others" along with Fiji and the Seychelle Islands and a host of other small countries.

The Authority is also to have a third branch of Government, a judiciary. But this tribunal is forbidden—forbidden—to declare any act of the Assembly ultra vires or to review any exercise of discretion by an administrative officer.

In the brief time available, I have touched only the high points of a regime that is wholly at variance with American concepts of the freedom of the seas. And it must not be thought that our giving up the freedom of the seas with respect to the seabed will end the downward slide.

If the treaty had proposed to vest in the Authority control of navigation of the very waters overlying the seabed whose freedom we are about to give away so casually, public outcry would stop the giveaway in its tracks.

But what, after all, is the rational distinction between the status of the bottom of the water column which constitutes the high seas and the surface of that water column? The treaty can be amended at any time by a three-fourths' vote of its members with respect to seabed matters, but after 10 years by as little as two-thirds' vote with respect to all other matters, including rights of navigation. The United States would be bound by that amendment whether the Senate ratifies it or not. I might add parenthetically that the treaty forbids any reservations by the Senate.

The capitulation—and I choose that word deliberately—the capitulation with respect to the seabed is supposed to have bought us recognition of navigational rights that we possessed anyway before the treaty was negotiated, such as free passage through the straits.

This became imperiled for the first time when the Nixon administration acquiesced in substituting a 12-mile territorial sea for the historic 3-mile line as part of a general treaty. And I may say, that decision was reached by an interdepartmental council at the under secretary level, headed by then Under Secretary of State Elliot Richardson.

Even if there were real gains, they could be wiped out by an amendment ratified by two-thirds of the signatory states, and such a majority can easily be mustered by the Soviet bloc and the Third World. The so-called Group of 77 now numbers 115 at last count.

We will have paid an enormous price—the cession of the freedom of the seabed—for an insecure title, the rights given us with respect to navigation that we possessed before there was a treaty and which we are buying back at this price.

So much for the overarching political factors which make the treaty a very unattractive climate for billion-dollar investments by American private enterprise.

Before turning now to the business features of the treaty, it should be pointed out that while the treaty contemplates that the United States shall sponsor the application of the American company for a contract with the Authority, that is about the last contact the company will have with his country's government.

It marches down the aisle, so to speak, on Uncle Sam's arm, but it marries the Authority. And Uncle is never seen again except as a lonely

member of the Assembly. We do not deal with our Government, we deal with this new supergovernment thereafter.

As to the business features of the treaty, I have analyzed these in some detail in a memorandum annexed to my prepared statement, which I ask to have printed as a part of the record, and I do hope you will read it. I can summarize it as follows, very briefly:

To put the problem in a few words, the treaty gives the investor neither the assurance of access to seabed minerals nor the assurance of a right to recover them at economic rates of production nor assurance as to how long that right will survive, notwithstanding the enormous investment required.

A substantial part of this investment goes to subsidize a competitor owned by the Authority that regulates and controls the private investor, called, ironically enough, the "Enterprise," to which private industry must transfer its technology.

This Authority is authorized and instructed to carry out a policy of protection of land-based producers from seabed mineral competition and to limit seabed production to that end, and to find a way to compensate on-shore producers for the consequences of this competition. It is exactly as though we were required to compensate the OPEC nations for any loss of their export earnings occasioned by our becoming self-sufficient with respect to oil.

A company desiring to explore the seabed is denied access unless it accepts a contract with the Authority. To get a contract an applicant must tender two mine sites it has discovered, at a cost of many millions of dollars over a period of many years, having done so in advance of any protection at all for its investment.

The Authority is to keep one site—the better one, naturally—for use by its own mining company, the Enterprise, with which private industry must compete. The Enterprise is heavily subsidized. The signatory nations are to give it start-up money. The United States will contribute in proportion to its United Nations contributions, 25 percent. Our share would be about $250 million, half in interest-free loans, half in guaranteed loans by third parties.

The Enterprise is not limited to operating in the donated areas reserved for it. It can operate anywhere. This amendment put the parallel system, so-called, in the garbage pail.

The private company must turn over its technology at forced-sale prices to its competitor. If we do not turn over technology, we cannot use it. And this includes the technology owned by third parties even if we cannot persuade them to donate or sell their technology. We cannot use technology that we cannot transfer. The technology that has made this industry possible is put on the forced auction block in this way.

The Enterprise is free from taxes. Private industry must pay burdensome exactions to the Authority as well as taxes to its own country. The treaty forbids the credit against the taxes we owe the Authority for taxes paid to the United States or any other country. Either the United States is expected to forego taxation of a seabed industry or Congress is expected to somehow enable us to pay taxes twice. We do not seek a subsidy.

If a private miner does get a contract for exploration, there is no assurance at all that it will ever get the essential second piece of

paper, a production authorization. The treaty is explicit in this warning.

The treaty imposes production limitations under an elaborate formula, and it reserves a right to enter into commodity agreements restricting production of the seabed of the entire world. It is instructed to protect onshore producing countries from reduction in their export earnings.

If these limitations make it impossible to honor all of the production authorization applications submitted to it, it has the authority to choose, and it is given certain criteria in making that choice: It shall give preference to the enterprise, it shall give preference to less developed countries.

These restrictions mean that it is virtually impossible that all four of the American-led mining consortia will ever be permitted to operate at one time.

Furthermore, the duration of a mining right is totally insecure. It is to be not over 20 years from the date when commercial production by anyone, anyplace, in the world, began, including our competitors, whoever they might be. And it is to end sooner than 20 years in the event that a commodity agreement says so.

Furthermore, the right is to last only until 5 years after the close of a review conference, which is to take place in 15 years. We are put on plain notice that the duration of our right is limited to not over 20 or 25 years at most. This is not an attractive scheme to private industry or, I would think, to the Congress.

But the question is often asked, as it was this morning, why is it that foreign companies will go ahead if our companies will not? The answer lies in the nature of their operations and their relations to their own government.

Take the very fine British companies as an example. British Petroleum, operating in less developed countries all over the world, has no great interest in deep seabed mining. If this did not take place at all, you could not find the effect on its balance sheet. But if it does go into deep sea mining and the Third World is critical of it, it can expect the type of reaction that it experienced in Libya where Qadhafi threw it out because British could not and would not stop the Shah's taking of three Arab islands in the Persian Gulf.

You cannot expect foreign companies, under that sort of pressure, to fail to go along with the treaty. But I echo what Mr. Learson said this morning. I think they will have just as much trouble raising money to operate under this treaty, $1 billion for each project, as American companies would have.

The American companies can and will escape from this by just not going into this business. There is no law that says they have to lose their money by going into deep sea mining. And they will not do it. They could not borrow money to lose even if they wanted to. But the effect will be tragic upon the American economy and national defense.

I therefore close as I began, by commending President Reagan for having the courage to stop in its tracks this slide down into a disastrous treaty. And if he is threatened now, as was indicated this morning, by other nations saying, "We are going ahead without the United States," I would rather anticipate the reaction from President Reagan would be that of a man who is not readily intimidated.

If they choose to do that, that is their business, but it is no reason for the United States to sign a treaty that commits us to the disastrous effects that I outlined.

Thank you, Mr. Chairman, for permitting me to exceed my time.

The CHAIRMAN. Thank you.

[Mr. Ely's prepared statement follows:]

PREPARED STATEMENT OF NORTHCUTT ELY

My name is Northcutt Ely. I am a lawyer in general practice, with offices in Washington, D.C.

I was honored by the Committee's invitation to testify. The opinions that I will state are my own, but, as the Committee may know, one of my clients is Ocean Mining Associates, a consortium organized to engage in deep sea mining.

That group of companies, and indeed all of the American mining companies represented in the American Mining Congress, have said that they would not be able to finance or conduct operations under the terms of the proposed treaty. The most recent such expression is a resolution approved by the Board of Directors of the American Mining Congress September 27, 1981, which I have furnished to the Committee.

The Reagan Administration is entitled to the gratitude of the American people for its courage in refusing to proceed to the signature of this treaty, as the Carter Administration had planned to do. The treaty's adverse effect on the American security of supply of critical strategic minerals is so drastic that the draft agreement should go back for renegotiation, no matter how long it takes. The reasons for this have nothing to do with the welfare of mining companies. The companies can, and if need be will, put their money to work in less risky and more profitable projects. But the departure of the American companies, controlled by American law and policies, would deprive the American economy and national defense of their one remaining opportunity to have permanent access to manganese, cobalt and nickel from sources not controlled by foreign countries, or foreign companies responsive to the policies of foreign governments.

A word about these metals, before returning to the treaty.

Without manganese, not a pound of steel could be manufactured. Without cobalt, manufacture of a long list of items critical to national defense, such as airplane turbine blades, would be imperilled. Without nickel, stainless steel could not be produced. We are almost totally dependent on foreign countries for all of these.

As to manganese, the United States, and indeed the whole free world, is presently dependent for 90 percent of its supply on eight mines located in five countries. These are the Republic of South Africa, Gabon, Australia, India and Brazil. Two-thirds of our total imports come from the two African countries. There have been no major manganese discoveries for a quarter-century. Unless huge new mines are discovered somewhere, it is probable that by the end of the next quarter-century the United States' primary sources of manganese will be the Republic of South Africa and the deep seabed. I have furnished the Committee a letter to myself from Robert L. L'Esperance, Director of Resource Planning and Development of the United States Steel Corporation, on this subject.

As to cobalt, the free world's major supplier is Zaire. The Committee will recall that when Cuban troops invaded Zaire from Angola, cutting off cobalt exports for a time, the price soared from less than $5.00 a pound to $50.00 or more.

As to nickel, while Canada is a major source, more than half of our total supply comes from mines in less-developed countries, and this ratio is increasing.

Copper, the fourth major seabed mineral, does not present such an ominous future, because the United States has large, if low-grade, copper reserve. But environmental constraints are a deterrent to their full exploitation, and the percentage of the American supply coming from foreign countries, now about 20 percent, can be expected to increase.

In short, the assurance of continuing accessibility of seabed minerals is vital to the American economy and national defense. These factors control the answer to the question of whether the United States should sign a treaty like the present draft.

Now for the reasons why American companies cannot and will not spend a billion dollars per project to go into business under a law of the sea treaty like the

present one, and why the control of seabed minerals will be in foreign hands if this treaty comes into force.

There are two basic reasons. The treaty would create a political climate hostile to private investment, and its specific provisions would so restrict the usefulness of the investment as to make it unattractive even if the political climate were benign.

The treaty would create a political regime in which control would be vested in the Soviet Union and the less-developed countries, and in which effective American authority would be minimal at best. This is because the treaty would put an end to the principle of the freedom of the seas, now applicable to keep sea mining, and supplant it by a concept of ownership and sovereignty—misnamed the "common heritage"—vested in a new supergovernment empowered to grant or deny access to the seabed on terms prescribed by the treaty. Those terms articulate the philosophy of the centrally planned socialist governments, not the market economy of the free world. The "Supreme Organ" of the Authority is to be an Assembly, in which the United States would have one vote, among some 155 nations. It differs from the Assembly of the United Nations, in that the new Assembly would have legislative powers. Perhaps the clearest measure of the ignominious role of the United States is found in the composition of the "Council," an executive agency with limited but important powers. Of 36 seats, the Soviet bloc is assured three, by name. The United States is assured none at all. It may well be elected to a seat from time to time by other industrial nations, its competitors, in rotation with them. Otherwise, it must depend on election as representative of a geographical region designated as "Western Europe and others," our country being one of the "others," along with such countries as Fiji and the Seychelle Islands.

The Authority is also to have a third branch of government, a judiciary. But this tribunal is forbidden to declare any act of the Assembly ultra vires, or to review any exercise of discretion by an administrative officer.

In the brief time available, I have touched only the high points of a regime that is wholly at variance with American concepts of the freedom of the seas. And it must not be thought that our giving up the freedom of the seas with respect to the seabed will end the downward slide. If the treaty had proposed to vest in the Authority control of navigation of the very waters overlying the seabed whose freedom we are about to give away so casually, public outcry would stop the give-away in its tracks. But what, after all, is the rational distinction between the status of the bottom of the water column which constitutes the high seas, and the surface of that water column? The treaty can be amended at any time, by a three-fourths vote of its members with respect to seabed matters, but, after ten years, by as little as a two-thirds vote with respect to all other matters—including rights of navigation. The capitulation with respect to the seabed is supposed to have bought us recognition of navigational rights that we possessed anyway before the treaty was negotiated, such as free passage through straits, which became imperilled for the first time when the Nixon Administration acquiesced in substituting a 12-mile territorial sea for the historic three-mile line, as part of a general treaty. Even if there were real gains, they could be wiped out by an amendment ratified by two-thirds of the signatory states, and such a majority can easily be mustered by the Soviet bloc and the third world. We will have paid an enormous price for an insecure title.

So much for the over-arching political factors which make the treaty a very unattractive climate for billion dollar investments by American private enterprise.

Before turning now to the business features of the treaty, it should be pointed out that while the treaty contemplates that the United States shall "sponsor" the application of an American company for a contract with the Authority, that is about the last contract that the company will have with this country's government. It marches down the aisle on Uncle Sam's arm, but it marries the Authority, and Uncle is never seen again, except as a lonely member of the Assembly.

As to the business features of the treaty: I have analyzed these in some detail in a memorandum annexed to this prepared statement, which I ask to have printed as part of it. I can summarize as follows.

To put the problem in a few words, the treaty gives the investor neither the assurance of access to seabed minerals, nor the assurance of a right to recover them at economic rates of production, nor assurance as to how long that right will survive, notwithstanding the enormous investment required. A substantial part of this investment goes to subsidize a competitor owned by the Authority

that regulates and controls the private investor, and to which private industry must transfer its technology. This Authority is instructed to carry out a policy of protection of land-based producers from seabed mineral competition, and to limit seabed production to that end. In more detail:

A company desiring to explore the seabed is denied access unless it accepts a contract with the Authority. To get a contract, an applicant must tender two mine sites that it has discovered at a cost of many millions of dollars, doing so in advance of any protection at all for its investment. The Authority is to keep one site (the better one, naturally), for use by its own mining company, the Enterprise, with which private industry must compete. The Enterprise is heavily subsidized. It is not limited to operate in the donated areas reserved for it. It can operate anywhere. The so-called "parallel system" is no more. The private company must turn over its technology at forced sale prices to this competitor. The Enterprise is free of taxes; private industry must pay burdensome exactions to the Authority as well as taxes to its own country. There is no assurance that the private applicant will get a contract even to explore, let alone produce, the mineral deposit that it has discovered. The Enterprise, and less-developed countries, have preference for an exploration contract. If the private miner does get a contract authorizing exploration, there is no assurance that it will ever get an essential second piece of paper, called a production authorization, and its investment may stand idle. The treaty is explicit in that warning. The treaty imposes production limitations, under an elaborate formula, and the Authority may enter into commodity agreements restricting production of the seabed. It is instructed to protect on-shore producing countries from reduction of their export earnings occasioned by mining of seabed minerals.

If these limitations make it impossible to honor all applications for production authorizations, the Authority is to count up the authorizations already issued to nationals of various countries, and make a choice. In so doing, it is to enforce anti-monopoly principles. This is another way of saying that not all of the four American-created consortia can expect to be in production at any one time. If the mining company successfully leaps over all of these hurdles, it finds that it has obtained a contract that cannot last longer than 25 years from the date of the first commercial production by anyone, anywhere in the world. The period may be made even shorter by "international arrangement," such as a commodity agreement, in which the Authority will represent seabed production in the whole world, whether the miner's own nation ratifies such an agreement or not. The contract is to end in any event five years after the conclusion of a "review conference" which is to be convened 15 years after the date of the earliest commencement of commercial production, by anyone, anywhere. This treaty jargon can all be compressed into a single warning: Watch out. We are going to get rid of you, and substitute a world-wide monopoly by the Enterprise, as soon as we have picked your brains and your pocket, and you are here at our sufferance for not over 25 years at most. The door can thus close against seabed mining by American companies at precisely the time when the United States becomes dependent on African countries and the seabed for minerals that it absolutely must have to survive.

This is not an attractive scheme for a mining company's management to put before its board of direcors or its bankers.

It should not be attractive to American government policy makers.

But the question is often asked: Why are some European companies willing to operate under the treaty, if American companies are not? The answer lies in the nature of their other operations, and their relations with their own governments.

Take as an example the very fine British companies, British Petroleum, Consolidated Goldfields, Rio Tinto Zinc, and Shell. The British Government granted subsidies to induce British companies to go into deep sea mining. That government owns a majority of the stock of British Petroleum. B.P. owns petroleum concessions in less-developed countries that are infinitely more important to it than in deep sea mining. If mining of the seabed were never to take place, the difference would not be apparent on the bottom line of the company's balance sheet. But if deep sea mining does take place under circumstances that alienate the third world, the consequences to the company, if it is held responsible, may be very severe. It was thrown out of Libya by Qadaffi because of the supposed failure of the British Government to prevent the take-over by the Shah of Iran of three Arab islands in the Persian Gulf, which Britain was powerless to prevent. No one could blame the company for avoiding a recurrence. Seabed mining is simply not worth it to a company with those stakes. Rio Tinto Zinc and Shell have a similar equation to solve. A loss of several hundred million dollars in a

disadvantageous treaty arrangement can be equated with the cost of a series of dry holes in drilling for oil.

It is quite likely that many of the score or more of foreign companies which have entered into consortium agreements with five American companies can look to their various governments for subsidies, or for indemnity against the effects of a bad treaty.

American companies do not have that luxury. The best that they have is the set of instructions given to the American negotiators in the Deep Seabed Hard Minerals Act of 1980, to bring home a treaty that would not impair their investments. Those instructions were quickly forgotten in the Carter Administration.

The hopes for an American seabed mining industry, and, more important, the hopes of American consumers for a source of strategic minerals free of foreign domination, rest now in the hands of the Reagan Administration. If it signs a treaty like the present draft, American companies can be expected to cut their losses and either get out of this business altogether, or to rent out their technology to the new masters of the seabed, as oil companies do in the OPEC countries. But while individual companies can save themselves to some extent in this manner, the American public cannot. The hard minerals of the deep seabed offer our last chance to convert a resource, discovered and produced by American technology, into a reserve of critical minerals, free of foreign domination. One OPEC is enough.

I have confidence that the Reagan Administration will measure up to this responsibility.

ANNEX

An Analysis of the Provisions of the Law of the Sea Treaty Relating to Mining of the Deep Seabed

I. THE GOVERNMENT THAT THE TREATY WOULD CREATE

The Authority would be a gigantic structure. (Part XI, Sec. 5). It would constitute a government, whose elements consist of an Assembly (the "supreme organ"), in which all signatories (expected to number more than 150) are represented, on a basis of one nation-one vote (Art. 159); a Council of representatives of 36 States (Art. 161), described as the "Executive Organ of the Authority," which in turn is served by a 15-man Economic Planning Commission (Art. 164), and a 15-man Legal and Technical Commission (Art. 165); a 21-judge International Tribunal for the Law of the Sea (Annex VI), which in turn consists of various "chambers," including an 11-judge "Seabed Disputes Chamber," and, of course, a Secretariat. Members of all of these "organs" are elected by the Assembly. Total employment may amount to several thousand people. While the Authority's organization is reminiscent of that of the United Nations, it differs drastically from the U.N. in that the new Assembly would have legislative powers, and the new Council would not have any permanent members and there would be no Great-Power veto. In the Executive Council,[1] the Soviet bloc is

[1] The 36 members of the Council are to be elected from five categories (Art. 161.1):

(a) Four from among the eight States which have the largest investments in activities in the Area, "including at least one State from the Eastern (Socialist) European region." Seven of the potential voters can be identified as the U.S., France, Italy, U.K., Japan, West Germany, and U.S.S.R.

(b) Four from among the States which, during the last five years, consumed or imported more than 2 percent of total world consumption or imports of minerals derived from the Area, including "in any case on State from the Eastern (Socialist) European region." These would appear to be the U.S., France, U.K., Japan, West Germany, Italy, Belgium, U.S.S.R., East Germany, and Poland.

(c) Four from countries which are net exporters of these minerals, including at least two developing countries. These might be Canada, Australia, Indonesia, U.S.S.R., Chile, Peru, Brazil, Zambia, Zaire, and Zimbabwe.

(d) Six from developing States representing special interests, identified by terms such as large populations, land-locked, geographically disadvantaged, major importers of seabed minerals, potential producers of such minerals, and least-developed States.

(e) Eighteen members are elected to secure "equitable geographical distribution" of seats in the Council as a whole. "For this purpose the geographical regions shall be Africa, Asia, Eastern Europe (Socialist), Latin America and Western Europe and others." The United States would be among the "others," an undefined but obviously large residue.

These bloc allocations are permanent, but seating within each bloc can vary, subject to mandatory allocations to the East European (Socialist) countries. Members are elected for four years (Art. 161.3), and are eligible for re-election, "but due regard should be paid to the desirability of rotating seats" (Art. 161.4).

specifically assured three seats. The less-developed countries have a minimum of eight (Art. 161.1(c)(d)) and are practically sure to have a majority in the Council, as they do in the Assembly. This is because they will doubtless obtain some of the 18 seats elected on a geographical basis (Art. 161.1(e)). The United States is not assured any Council seat at all, although it may well be elected to one from time to time, in rotation, by the votes of its competitors, the other industrial nations (Art. 161.1(a)(b)), or as a geographical representative of "Western Europe and other" nations. (Art. 161.1(e).)[2] Comment is scarcely needed on the demotion of the United States to the crowded category called "and other" nations, of all sizes and numbered in the scores.

II. THE CONVENTION FAILS TO PROVIDE "ASSURED AND NONDISCRIMINATORY ACCESS"

Title II, Section 201 of the 1980 Deep Seabed Hard Mineral Resources Act, 30 U.S.C. § 1441 (1980), affords a benchmark against which to test the Treaty's relation to American national interests. It instructs the American negotiators that any international agreement pertaining to seabed must provide both "assured and nondiscriminatory access, under reasonable terms and conditions, to the hard mineral resources of the deep seabed for United States citizens," and "security of tenure by recognizing the rights of United States citizens who have undertaken exploration or commercial recovery under Title I of the Act before such agreement enters into force with respect to the United States to continue their operations under terms, conditions, and restrictions which do not impose significant new economic burdens upon such citizens with respect to such operations with the effect of preventing the continuation of such explorations on a sound economic basis."[3] The draft Convention, as we shall see, fails these tests, with potentially catastrophic consequences to the security of supply of the minerals which the seabed could provide to the Western world.

A. *Conditions to access: donation of a mine site.*—Under the draft Convention a mining applicant must first obtain a contract from the Authority entitling it to explore and exploit a specific area under an approved "plan of work" (Art. 153.3; Ann. III, Art. 3). To be eligible for such a contract, the miner must have obtained enough information to enable it to submit to the Authority two mine sites of supposedly equal commercial value (Ann. III, Art. 8). The Authority will keep one (the better one, naturally), as a "reserved site" for use exclusively by its mining company, called "The Enterprise," or by developing nations. The other site is "unreserved." Area of a site is to be determined by the Authority (Ann. III, Art. 17.2(a)).

To reach this stage, the applicant will have spent several million dollars in prospecting and exploration with no protection at all for its investment.[4] All precontract activities are classed as "prospecting" (Ann. III, Art. 2), although far more than "prospecting" in the ordinary sense is obviously required to produce the data required to enable the Authority to make a choice as between two mine sites. (Ann. III, Art. 8). And, as we shall see, the applicant has no assurance that it will get a contract covering even the "unreserved" site, the less attractive of the two that it submitted.[5]

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[2] The selection of members of the Council from member categories has not been greatly improved by the concept of "caucus election" where each group in the Assembly would select its representative members for the Council. Art. 161.2(c). This provides no assurance for the United States of a permanent Council seat. Its fellow members in any group are its industrial competitors, and, if the United States is elected, its seat is not permanent, but is subject to a declared policy of rotation (Art. 161.4).

[3] Section 201 further requires that the extent to which an international agreement meets the above requirements "should be determined by the totality of the provisions of such agreement."

[4] Prospecting may be undertaken only after the Authority has received a satisfactory written undertaking that the proposed prospector will comply with the Convention. Prospecting may be carried out by more than one prospector in the same area or areas simultaneously. Prospecting does not "confer any preferential, proprietary, exclusive or any other rights on the prospector." (Ann. III, Art. 2.)

[5] The PIP (Preliminary Investment Protection) proposal suggested by some U.S. representatives does not assure the security of tenure required by the Deep Seabed Hard Mineral Resources Act. PIP would have a miner "bank," *i.e.*, donate, a "reserevd" area in advance of the Convention's coming into force, in exchange for the right to apply first for a mining unit. Once in force, the entire Convention would of course apply to such a miner, including production authorization requirements, production limitations, anti-monopolization policy, "density" restrictions, etc., discussed later. These are "significant new economic burdens," in the language of Section 201 of the Hard Mineral Resources Act.

B. *Competition for the applicant's mine site can be expected from several sources:*

1. *The Enterprise can apply for that site.*—(Art. 153.2(a).) The Enterprise is explicitly authorized to operate in non-reserved areas (Ann. III, Art. 3.2), reversing the original concept of a "parallel" system under which private industry and the Enterprise would each operate to the exclusion of the other in designated areas.

2. *A less-developed country can apply.*—Art. 153.2(b).) If so, it is to have "special consideration" (Art. 152.2). In addition, less-developed States "and their nationals" are extended an invitation to enter into joint ventures with the Enterprise, with "opportunity for effective participation" (Ann. III, Art. 9.2).

3. *A competitor can apply.*—(Art. 153.2(b).) A competitor may get the contract if it has filed an application before our miner has done so (which it well may, since our miner's prospecting activities will have been highly visible) (Ann. III, Art. 6.3), or if the competitor offers the Authority more money, or earlier production (Ann. III, Art. 7.3(b)), or other inducements such as an offer of a joint venture with the Enterprise (Ann. III, Art. 9.2 and Art. 11), or a better offer to transfer technology to the Enterprise or developing countries or their nationals in a "joint arrangement" with the Enterprise (Ann. III, Art. 13.1(d)[6]). Joint ventures with the Enterprise are to be encouraged by financial incentives (Ann. III, Art. 11.2).

4. *Since the treaty prohibits monopolization* (Ann. III, Art. 6.3(c), 6.4, 7.5), and contains complex anti-density restrictions (Ann. III, Art. 6.3(c)), the application may be denied because another company sponsored by the same nation already has a contract, on some other site, within a specified distance.[6]

5. *As to "Automaticity".*—The question of whether any group of nations should have a "blocking vote" in the Council of 36 States, with respect to the approval of work plans, has been an acrimonious one from the beginning, and, as respects the right of a miner to obtain a contract, the currently proposed solution remains quite unsatisfactory. An early draft of the Convention provided that if the Legal and Technical Commission recommended the approval of a work plan, its recommendation should take effect automatically, resulting in signing a contract, unless disapproved by the Council within 60 days. (ICNT, Art. 160.2(x).) A later draft reversed this notion of "automaticity," (ICNT, Rev. 2, Art. 162.2(j)), in effect empowering a small minority to block a contract. The current draft, in Article 161, sets up a complicated system of voting in the Council, in which action on some matters requires consensus (Art. 161.7(d)), defined as the absence of formal objection (Art. 161.7(e)), on others requires a three-fourths majority (Art. 161.7(c)), on others needs a two-thirds majority (Art. 161.7(b)), and on others requires only a simple majority (Art. 161.7(a)).

Under the complicated scheme of the present draft (Art. 162.2(j)) enormous leverage is given to the recommendations of the Legal and Technical Commission.[7] Thus, if a "plan of work" is recommended for Council approval by the Commission per Annex III, Article 6, the Council is deemed to have given its approval if no Council member objects in writing within 14 days (Art. 162.2(j)(i)). If such an objection is received, a "Conciliation Committee" of nine members, organized under Article 161.7(e), shall attempt to resolve the controversy. (Art. 162.2(j)(i).) If, after another 14 days, the objection to the plan of work is still maintained, "the plan of work shall be deemed to have been approved by the Council unless the Council disapproves it by consensus among its members" excluding the State or States, if any, making the application or sponsoring the applicant. (Art. 162.2(j)(i).) The effect intended seems to be to turn consensus on its head, after the second 14 days; a resolution of dis-

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[6] The application must be rejected if, together with all other plans of work held by parties sponsored by the same State, the total area encompassed exceeds 30 percent of a "circular area of 400,000 square kilometers" surrounding the center of "either part." *i.e.*, the "reserved" half as well as the "unreserved" half, of the area covered by the proposed plan of work. (Ann. III, Art. 6.3 c(1).) So also if a State has sponsored applications which constitute 2 percent of the world's total unreserved seabed area (Ann. II, Art. 6.3 (c)(ii)).

[7] This commission consists of 15 members, chosen with regard to "equitable geographical distribution and representation of special interests" (Art. 163.2. 4), as well as competence. There is no time schedule or procedure to be met which would encourage the minimization of delay by the Legal and Technical Commission.

approval requires consensus, i.e., lack of formal objection. One nation (other than the sponsoring State) could apparently block disapproval. All this, however, presupposes a favorable recommendation by the Legal and Technical Commission in the first place.

But if the Commission recommends the disapproval of a plan of work or does not make any recommendation at all, a three-fourths majority vote of the Council is necessary to approve the plan. (Art. 162.2(j)(ii)). The affirmative vote of 27 members would thus be required. Ten could block. The Soviet vote of 3 plus the minimum L.D.C. vote of 8 total 11. Since both the Council and its Commissions represent the same constituency, i.e., "equitable geographical distribution and representation of special interests," it is difficult to believe that the Council would reverse, by a three-quarters majority, an adverse decision made by a majority of its Legal and Technical Commission.

III. THE CONVENTION DRAFT FAILS TO MEET THE REQUIREMENT OF THE DEEP SEABED HARD MINERALS ACT FOR "SECURITY OF TENURE BY RECOGNIZING THE RIGHTS OF UNITED STATES CITIZENS WHO HAVE UNDERTAKEN EXPLORATION OR COMMERCIAL RECOVERY" UNDER THE ACT

A. *The requirement of a production authorization.*—If our applicant does obtain a contract,[8] it is important to note that this does not entitle the holder to produce any minerals. Although the contractor receives what is called an exclusive right to explore "and exploit" a specific area, (Ann. III, Art. 3.4(c)), nevertheless, before exploitation can begin, a second piece of paper must be obtained, called a production authorization. This document permits production at a specified rate (Art. 151.2; Ann. III, Art. 7). The miner cannot apply for this until it can promise to be in production within five years thereafter. (Art. 151.2.) Since a longer time than five years may well elapse between the date when the decision to go ahead with full-scale production is made and the date when that production will be on the line, this means that a mining company will be expected to pour scores of millions annually into a project to produce from an area on which it has a contract before even being able to apply for permission to put the investment to use.

B. *Selection among applicants.*—When the miner is permitted to apply for a production authorization (within, but not before, five years of the anticipated commencement of production, Art. 151.2), there is no assurance at all that it will get the authorization requested.

Indeed, the draft Convention explicitly warns that not all the companies which hold exploitation contracts will be awarded production authorizations. Annex III, Art. 7.2. provides that "where the selection must be made among applicants for production authorizations because of the production limitation set forth in Article 151, paragraph 2, or because of the obligations of the Authority under a commodity agreement or arrangement to which it has become a party, as provided for in Article 151, paragraph 1 . . ., the Authority shall make the selection on the basis of objective and non-discriminatory standards set forth in rules and regulations drawn up in accordance with this Article." But it goes on to say in paragraph 5 that "selection shall be made taking into account the need to enhance opportunities for all States Parties, irrespective of their social and economic systems or geographical locations so as to avoid discrimination against any State or system, to participate in activities in the area and to prevent monopolization of such activities. The provisions of this subparagraph shall be applied whenever the Authority considers priorities for production authorization." (Ann. III, Art. 7.5.)

C. *Priorities.*—Beyond this, as paragraph 6 says: "Production authorization with respect to reserved areas shall have priority whenever fewer reserved sites than non-reserved sites are under exploitation." (Ann. III, Art. 7.6.) Since this imbalance will be created when the first production authorization is awarded to anyone, on a non-reserved area, the second applicant on a non-reserved area has no assurance of approval until a production authorization has been approved for the Enterprise on a reserved area, and so on ad infinitum. But it is quite

[8] A contract applicant must be sponsored by all the member States which control the miner (Ann. III, Art. 4.2). But the determination of "control" is subject to investigation for several purposes, among which is determination of national quotas. (Ann. III, Art. 6.3(c), 6.4). Where applicants are consortia of multi-national corporations, far-reaching concepts of control may cause denial of contracts to applicants on grounds of conflict with density or anti-monopolization criteria. *Cf.* Ann. III, Art. 6.3(c).

possible that the Enterprise will elect to devote its resources to joint ventures in non-reserved areas (Ann. III, Art. 11). If so, its unexercised right to a production authorization for a reserved area can maintain its preferred status indefinitely. Moreover (assuming still that selection among applicants is required because of the Convention's global production limitation or a commodity agreement), an application for a production allocation may be defeated by that of a later-filing competitor which offers better financial terms. (Ann. III, Art. 7.3(b).) So also as to the application of a competitor sponsored by some other State, particularly a less-developed nation, inasmuch as monopolization (read "by the United States") must be prevented (*id.*, Art. 7.5). And even if a production authorization is granted, it may be for a later date, or a lesser rate of production, than that applied for, because of the imposition of global production limitations, discussed infra.

The combined effect of the restrictions and priorities identified in paragraphs (B) and (C) above is to make it highly unlikely that all four of the American-led consortia would be granted concurrent production authorizations, at least until the other nations of the world had caught up. Meanwhile, the investments of the excluded American companies would stand idle. This moratorium could last for several years.

The clear effect of this two-tier or "split contract" arrangement is to deter investment, whereas the Deep Seabed Hard Mineral Resources Act is designed to encourage investment.

IV. CONSTRAINTS ON PRODUCTION

If the miner does obtain authorization to produce, it must operate under formidable constraints. For example:

A. *The miner must agree to accept control by the Authority of all mining operations (Ann. III, Art. 4.6(b)).*—The restrictions on this control are meagre, and are so couched as to maximize the Authority's discretionary powers, which are expressly excluded from judicial review (Art. 190).

B. *The general declaration of policy (Article 150) is one of anti-production.*—This permeates the entire draft Convention via repeated cross-references. See, for example, Article 150(g), stating as one objective: "The protection of developing countries from adverse effects on their economies or on their export earnings resulting from a reduction in the price of an affected mineral, or in the volume of that mineral exported, to the extent that such reductions are caused by activities in the Area, as provided in Article 151." (Article 151 contains production limitations.) The draft is slanted throughout in favor of less-developed countries (a bias which is explicitly acknowledged in Article 152.2). While the Convention is oriented toward the protection of land-based producers and toward keeping seabed production low (Art. 150), it inconsistently mandates the optimization of the Authority's revenues from the seabed (Ann. III, Art. 13.1(a)).

C. *Restrictions on production of two kinds are imposed.*—One is stated in a complicated production ceiling formula (Art. 151.2). The other may be imposed by a future commodity agreement (Art. 151.1). Both are like the sword of Damocles, poised permanently over the head of the investor.

(1) *The production limitation formula* stated in Article 151.2 is so complicated as to be impossible to explain in layman's language.[9] Experts differ in translating it into numbers. Insofar as manganese, copper, and cobalt are concerned, the draft Convention is flawed by restricting production by a formula which is related exclusively to the growth of the market for nickel. The levels of a contractor's production of copper, manganese and nickel can be no higher than they would have been if the maximum allowable quantity of nickel had been produced from those same ores (Art. 151.2(f)). These restrictions are global, *i.e.*, an application for a production authorization can

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[9] It involves calculation of the difference, from time to time, between two "trend lines" derived from a "linear regression of the logarithm of actual nickel production for the most recent 15 year period for which such data are available, time being the independent variable," these two trend lines having different commencement dates. The effect intended is apparently to restrict seabed production of nickel to 60 percent of the growth of world demand for that metal, and to fit the rate of growth of seabed copper, manganese and cobalt production into that Procrustean bed, regardless of the actual demand for those other metals. It is interesting to speculate how many of the 2,000 or so participants in the Treaty negotiations know how to calculate a linear regression of a logarithm, or have ever seen one.

be denied or deferred if other authorizations, anywhere in the world, cumulatively, have preempted the quantity of world production permitted by the ceiling. The Convention is not clear as to whether the world-wide "allowable" is to be pro-rated among applicants, or whether each is to receive all or none of the allocation applied for. The draft contains a floor for production of nickel by the Enterprise (38,000 tons annually, Art. 151.2(c)), and a ceiling for production of nickel by any one contractor (45,500 tons per year [10] (Art. 151.2(e)). The related ceilings on that contractor's production of other metals depend on the ratio of their percentages present in the nodules.

(2) *Commodity agreements.*—The Authority represents all seabed mining operations throughout the world's seabeds, in negotiating commodity agreements, regardless of whether these agreements are ratified or rejected by a miner's own nation (Art. 151.1). Such commodity agreements can reduce production even below the formula stated in Article 151.2.

D. *Non-impairment of economics.*—As previously noted, the draft Convention covenants that production of seabed minerals shall not be permitted to impair the economy or diminish the export earnings of producing countries (Art. 150 (g)), and, if this does happen, compensation shall be paid. (Art. 151.4, 160.1(*l*).)

This is as though the United States should promise to reimburse the OPEC countries for any loss of export earnings they might sustain as the result of this country's attaining self-sufficiency in oil production. The draft is silent on how the money is to be raised, or, if it is not paid, whether seabed operations shall be curtailed.

E. *The miner is in competition with the subsidized Enterprise* and with companies that have entered into joint ventures or production-sharing agreements with the Enterprise. It is important to note that the Enterprise is not restricted to operating in the areas reserved to it, i.e., those donated by applicants for contracts on non-reserved areas. It is perfectly free to apply for approval of a "plan of work" anywhere (Ann. III, Art. 3.2). Financial incentives to cooperating companies are authorized (Ann. III, Art. 11.2, 13.1(d), 13.14).

The Enterprise has several competitive advantages (aside from the fact that it is owned by the regulator of its competitors. These include:

(1) *Donation of a site.* As we have seen, the Enterprise is the beneficiary of the compulsory donation of a fully prospected (and perhaps explored) mine site by each applicant for a contract (Ann. III, Art. 8). This may well represent several years' work and several million dollars of front-end expenditures made permanently non-productive insofar as the donor is concerned.

(2) *Subsidized financing.*—The Enterprise is the beneficiary of low-cost financing, to be provided by the nations ratifying the Treaty, in the amount required to enable it to explore and exploit one site, and transport, process and market metals. (This amount is expected to approximate $1.25 billion.) (Ann. IV, Art. 11.) One-half of this is in the form of non-interest-bearing loans (Ann. IV, Art. 11.3(b)), made by States in accordance with the United Nations scale of assessments, and one-half is in loans by third parties, repayment of which is guaranteed by the member nations (id.). (The United States' assessment is 25 percent of the total United Nations' assessments.) The cost of money provided or guaranteed by governments can be expected to be much lower than the cost of money to the private miner.

(3) *Exemption from payments to Authority.*—The Enterprise, for the first ten years, can be made free, on vote of the Assembly, of the necessity of making any payments at all to the Authority. (Ann. IV, Art. 10). By contrast, the financial burden on the private miner is very heavy (Ann. III, Art. 13) (see "F" below).

(4) *Tax exemption.*—The Enterprise is authorized and encouraged to negotiate exemption from taxation by the countries in which it operates (Ann. IV, Art. 13.5). (This can include, for example, ad valorem on processing plants and on-shore bases for maritime operations, income taxes, and

[10] It is never made clear whether these are tonnages of pure contained metals, or tonnages of minerals in basic marketable form, such as metallurgical grade manganese ore (say 48 percent Mn), or blister copper. Royalties are calculated on the value of processed metals in "the most basic form in which they are customarily traded on international terminal markets." (Ann. III, Art. 13.7(a).) The Convention does not say whether the stated tonnages are in long tons, short tons, or metric tons.

taxes on purchases of equipment and supplies.) Obviously, the private miner is in no such favored position. Indeed, the American miner faces double taxation on income (see "F" below).

(5) *Transfer of technology.*—The theme of compulsory transfer of technology for the benefit of less-developed States recurs throughout the draft Convention (e.g., Art. 144, 170.4, 268, 269, 271, 272, 273, 274, 277, 278, and Ann. III, Art. 5, 13.1(d), 17.1(xi)). For the first ten years (Ann. III, Art. 5.7), the private miner must transfer his technology to the Enterprise, relating to both mining and processing, for compensation to be determined by negotiation or arbitration (Art. 144; Ann. III, Art. 5). Manifestly, the compensation asked by the miner for transferring its technology would be an element of the competition in determining which of several applicants for an exploitation contract or production authorization shall be successful, especially since the agreement to transfer is a precondition to access in the first place (Ann. III, Art. 5.3). If technology is not transferred the investor may have its contract revoked (Ann. III, Art. 5.4). The miner is forbidden to use technology that it does not transfer even though the technology is owned by third parties who refuse to consent. (Ann. III, Art. 5.3(b).) The Authority can convene a conference of all the nations which have sponsored applicants, to apply pressure to require disclosure of technology (Ann. III, Art. 5.5).

F. *Financial exactions.*—By contrast with the Enterprise's ten years' holiday from payments to the Authority and presumptive exemption from national taxation, the Convention draft imposes a burdensome and complex set of financial exactions on the miner. These are of four kinds (Ann. III, Art. 13):

(1) *An application fee* of $500,000 (Ann. III, Art. 13.2);

(2) *A fixed annual fee* of $1,000,000 until the miner enters into commercial production; thereafter, that amount, or a production charge, whichever is greater (Ann. III, Art. 13.3);

(3) *A production charge* commencing one year after commercial production begins, either at an initial rate of 5 percent (rising to 12 percent in the eleventh and subsequent years) of the gross value of processed metals (Ann. III, Art. 13.5); or,

(4) *If the miner so elects, a combination of royalty and production charge* (Ann. III, Art. 13.4). In such case, the royalty is a stated percentage (2 or 4 percent) of the gross value of processed metals (Ann. III, Art. 13.6(a)). It is payable whether or not there is any profit. The production charge is a variable percentage (see below) of that portion, not less than 25 percent, of the net proceeds which is attributable to mining. This ratio is determined by the ratio of the development cost of the mining sector to the contractor's total development cost (Ann. III, Art. 13.6(e)). A distinction is made between the "first period of commercial production," which lasts until the miner has recovered its development costs (defined) plus interest, in ten equal annual installments, and the "second period of commercial production," which then becomes operative (Ann. III, Art. 13.6(d)). When the first period ends, the royalty, initially 2 percent, is increased to 4 percent.

The Authority's share of attributable net proceeds (always subject to a minimum of $1,000,000 annually), is stated in an incremental schedule in three brackets (Ann. III, Art. 13.6(e)). The first bracket consists of "that portion representing a return on investment which is greater than 0 percent but less than 10 percent." The Authority's share is to be calculated at a rate of 35 percent during the first period (i.e., until the contractor's development costs, with interest, are recovered), thereafter at 40 percent. The second bracket consists of "that portion representing a return on investment which is 10 percent or greater, but less than 20 percent." Here the Authority's share is 42.5 percent until development costs, with interest, are recovered; thereafter is 50 percent. The third bracket consists of "that portion representing a return on investment which is 20 percent or greater." The rates are 50 percent and 70 percent, as above. The royalty, calculated on market value of processed metals, (Ann. III, Art. 13.6(a)(b)), is a deductible expense (Ann. III, Art. 13.6(k)) in determining the Authority's "share" (i.e., tax) which is related to net proceeds attributable to mining.

The Total "Take".—It is not easy to calculate the combined impact of a royalty (2 to 4 percent) on the gross market value of all processed metals, combined with a tax of 35 to 70 percent on the portion (not less than 25 percent) of the net proceeds attributable to mining. But this much is clear:

(1) The royalty is calculated against the gross sales value of processed metals, not against the value of the crude minerals as recovered from the seabed. The royalty is thus collected upon the value added after the minerals reach land. It is as though Saudi Arabia were to calculate royalties, not on the value of crude oil at the Arabian port of export, but upon the price realized for gasoline and fuel oil at the pump in the United States, irrespective of the intervening costs of transportation, refining and marketing.

(2) The Treaty postulates that the gross value of processed metals may be four times as much as the value attributed to seabed mining (Ann. III, Art. 13.6(e)). In such case, the royalty is collected on $3.00 of value added by processing on land, in addition to the $1.00 attributable to mining. What business is it of the Authority, to go about collecting royalties on operations of an on-shore processing plant in the United States, built here with American capital? What proper concern does the Authority have in determining that plant's permissible "debt-equity ratio" and "rates of interest" it must pay for the capital that it borrows? (Ann. III, Art. 13.6(o).) What if the miner sells its nodules to a refinery or pays a toll for processing by a custom refiner instead of constructing its own processing plant; Who pays the royalty on value added by processing? The draft never makes clear whether the Authority has power to initially approve or reject plans for a processing plant, or require their modification, but it is arguable that such power is implicit in the Convention's references to the Authority's interest in processing, including recovery efficiencies (Ann. III, Art. 13.7(b)).

(3) The other side of the coin is that the greater the investment in ocean mining as compared with total investment in the project, the greater becomes the percentage of the project's net income that is subject to tax. If this ratio, for example, is found to be 50 percent instead of 25 percent, the tax is doubled. As no two companies will have identical investments in seabed mining, tax uniformity is out of the question.

(4) It is not possible to translate the royalty on gross proceeds of processed metals into a comparable tax on net income attributable to mining, unless and until the Authority makes its determination of the portion attributable to mining. It may be 25 percent (the minimum), or, as noted above, it may be a much higher figure; this seems to be contemplated if the miner recovers four metals, rather than three (Ann. III, Art. 13.6(e)). But, in any event, since net income from sale of processed metals will be manifestly only a fraction of gross sales receipts, it follows that the percentage (2 or 4 percent) stated as a royalty on gross revenues is equivalent to a much greater percentage of net income. For example, if the ratio of net profit to gross sales is 10 percent, a royalty of 4 percent on gross receipts is equivalent to a tax of 40 percent of that profit. If, as another example, the ratio of profit to gross sales is as low as 5 percent, a royalty of 4 percent of gross is equivalent to a tax of 80 percent on net. This is not an unreasonable range of ratios of profits to gross sales in conventional mining. (These numbers must not be confused with rate of return on investment.) To this exaction must be added a tax of up to 70 percent on the portion of net income attributable to deep sea mining. The combined "take" may well be confiscatory, or at least crippling in competition with the wholly tax-free Enterprise.

(5) As we have seen, (Ann. III, Art. 13.6(c)) the rate of tax is related to the return on investment, and the return on investment is classified in three brackets: 0–10 percent, 10–20 percent, over 20 percent. In the lowest bracket, the tax is either 35 percent or 40 percent, the rate changing when the miner has recovered its investment. As to this, two thoughts occur: (i) How is the miner to recover its investment if its rate of return is zero? (ii) Is the miner really expected to find money to pay an income tax of 35 percent (in addition to a 2 percent royalty on gross revenues) if annual return on investment is zero, or even if it approaches 10 percent?

(6) In the highest bracket, *i.e.*, if the rate of return exceeds 20 percent, the tax on income attributable to mining is 50 percent until the investment is recovered, and thereafter 70 percent, plus a 4 percent royalty on gross value of processed metals. The imposition of a punitive tax if the rate of return exceeds 20 percent indicates some unrealistic thinking. Investors, in considering a proposed on-shore mining investment, frequently reject any which fail to project a rate of return materially higher than 20 percent.[11]

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[11] The risks and costs inherent to deep sea mining are much greater than those in conventional mining on shore, and there is no assurance that ocean mining will produce a greater return on the investment than can be anticipated from on-shore mines.

Double Taxation.—This is all quite aside from the added effect of taxation by the nation in which the miner's processing plant or marine base is located, and taxation by the nation having tax jurisdiction over the private mining company as one of its nationals. Annex III, Article 13.6(p) forbids credit for national taxes against amounts due the Authority, thus explicitly exposing the private miner to double or triple taxation. Or is the United States tacitly expected to forego taxes which it would be entitled to collect on the income of American ocean miners in the absence of a Treaty?

Customs duties.—An additional complication is introduced by Article 150(i), which stipulates that "conditions of access to markets for the import of minerals produced from the resources of the Area and for import of commodities produced from such minerals shall not be more favorable than the most favorable applied to imports from other sources." This seems to mean that the United States must impose the same customs duties on minerals won from the sea by American nationals that it collects on similar minerals produced within foreign countries. This is the sort of question that ought to be decided by Congress, in its discretion.

The competing Enterprise, we may note again, is to be presumptively exempt from all local taxation, and explicitly exempt from all payments to the Authority for ten years.

G. *Sanctity of contract.*—There is demonstrable failure to assure the sanctity of the mining contract and the stability of the mining regime, despite language about security of tenure. An essential element of every mining law which has succeeded in attracting venture capital is the assurance that if the miner spends money to explore, he shall have a right to produce the minerals he discovers. Where this assurance is not expressed in the statute (as it is in the Deep Seabed Hard Minerals Act, Sec. 102(b)(3)), it is given effect in practice. That assurance is wholly lacking here. Indeed, as we have seen, the Convention gives fair warning that the granting of an exploitation contract gives no assurance of issuance of a production authorization (Art. 151.1, Ann. III, Art. 7.2). Four classes of preference are established (Ann. III, Art. 7.3) if not all contract holders can be awarded production authorizations because of the Treaty's global production ceiling or a commodity agreement (the latter, of course, may come into existence after the contractor has invested large sums). A miner must also promise in advance to abide by as yet unknown rules and regulations of the Authority for the benefit of "developing States and peoples who have not attained full independence or self-governing status" (Art. 162.2(n)) (read "P.L.O.").

H. *Dispute settlement.*—There is a near-complete failure to provide contractors a meaningful mechanism for settlement of disputes with the Authority by a neutral adjudicator. For example, in binding arbitration is invoked (Ann. VII), the Convention draft, while indicating that the UNCITRAL rules shall apply, also contemplates the possible replacement of these rules by future rules and regulations of the Authority (Art. 188.2(c)). Moreover, an arbitral panel cannot consider any issue pertaining to any question of interpretation of the Convention (Art. 188.2(b)). Such questions must be sent to the Seabed Disputes Chamber ("SBDC") of the International Tribunal for the Law of the Sea (Art 187). But that tribunal, in turn, is forbidden to question exercise by the Authority of discretionary powers, or even to declare that any rules, regulations or procedures adopted by the Authority are *ultra vires* (Art. 190). The composition of the Tribunal, and its Seabed Disputes Chamber, can be expected to reflect the overwhelming majority of Third World votes plus Soviet bloc votes in the Assembly. (See Ann. VI.) It is significant that the Treaty makes no attempt to establish a disputes settlement mechanism by means of the minor amendments that might be required in the Statute of the International Court of Justice, a 17-judge, 17-nation tribunal representative of the principal legal systems of the world, and by amendment of the arbitration machinery of the World Bank, but instead sets up a new tribunal which the Third World and the Soviet bloc can dominate.

V. DURATION

The duration of the miner's exploitation right is not fixed. It is to be related to the economic life of the mining project (Ann. III, Art. 17.2(b)(iii)), but short enough "to give the Authority an opportunity to amend the terms and conditions of the plan of work at the time it considers renewal . . . ." *Id.* In any event, it lasts only during an "interim period" which begins five years *before* earliest commercial production (by anyone) begins, and lasts not over 25 years or until "new arrangements" enter into force (Art. 151.2(a)). These new

arrangements can be either the result of a commodity conference, which can occur at anytime,[12] or the result of a "Review Conference," which is to be convened 15 years from 1 January of the year in which commercial production (by anyone) first took place (Art. 155). This Review Conference is to decide whether the "interim period" is to be succeeded by a new kind of regime (Art. 155), to be submitted as an amendment to the Convention. If such an amendment is ratified by two-thirds of the States parties it can go into effect five years after the Conference is convened, *i.e.*, 20 years after the first commercial production by anyone occurred.[13] In either event, the amendment binds the United States—even if the United States Senate refuses its consent. The duration of a miner's exploitation right, consequently, can apparently be equated with a maximum of 20 years from the date of commencement of commercial operations, but this date of commencement may relate to some competitor's earlier initiation of commercial production, and there is no assurance against curtailment of the miner's production long before expiration of that period in consequence of the Authority's accession to a commodity agreement.

Seabed mining by private industry is thus an insecure operation for an "interim period" only. There is no assurance that an investment of a billion dollars or more, required to put a deep sea mining project into production, can be utilized for the economic life of the ore body or the period of amortization of the investment.

UNITED STATES STEEL CORP.,
Pittsburgh, Pa., September 29, 1981.

Mr. NORTHCUTT ELY,
600 New Hampshire Avenue, Suite 915,
Washington, D.C.

DEAR MR. ELY: This will confirm our conversation of September 28, 1981 in regard to the National Materials Advisory Board's Report NMAB-374, 1981 of the Panel on Manganese, titled "Manganese Reserves and Resources of the World and Their Industrial Implications". Manganese is essential to steelmaking.

Following is my assessment of the salient facts of the said report and significant conclusions to be drawn therefrom.

The charge to the Panel at the request of the U.S. Bureau of Mines was to make the best estimate of the manganese content of land-based reserves. Reserves are quantities of material which are economic to mine at time of determination.

The Panel found that proven reserves of contained recoverable manganese, (where proven means an accuracy of less than 20% error) were about 325 million metric tons, whereas the U.S. Bureau of Mines' probable cumulated estimated demand to the year 2000 was 330 million metric tons.

The Panel found that indicated reserves (50% error) were 243 million and inferred reserves (less reliable than indicated) were 326 million contained metric tons of recoverable manganese. These 569 additional million tons, of lesser reliability, could have a life of an additional 20.7 years if the USBM growth rate continues beyond the year 2000 without change. If there is an error of 50%, the life could be correspondingly less.

The report found that there were adequate reserves to supply world steel demand through the year 2000, but did not extrapolate beyond the year 2000, now only 19 years away, because the charge given to the panel limited it to that time frame. In the perspective given above the total life of these reserves would be about 39 years from 1980.

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[12] A commodity agreement can clearly preclude issuance of a production authorization notwithstanding the contractor's prior investment. What is uncertain is whether such an agreement can curtail a previously issued production authorization. The answer is probably in the affirmative if the curtailment is enforced prorata against all such authorizations. See Art. 151.1.

[13] Amendments to the Treaty can be adopted at any time, but amendments relating to activities in the "Area" (*i.e.*, the seabed beyond the limits of national jurisdiction) are not to prejudice the "system of exploraton and exploitation pending the Review Conference in accordance with Article 155" (Art. 314.2), must not derogate the principle of the "common heritage of mankind" (Art. 311.6), and would require ratification by three-fourths of the States Parties (Art. 316.a). Other amendments, not relating to the "Area," require only ratification of two-thirds of the parties or by 60 parties, whichever is greater (Art. 316.1). A party may denounce the Treaty on one year's notice (Art. 317), but "the denunciation shall not in any way affect the duty of any State Party to fulfill any obligation embodied in this Convention to which it would be subject under international law independently of this Convention." It can be anticipated, with some confidence, that the argument will be made that the Convention is declaratory of customary law, evidenced by the accession of over 60 States, and is thus binding on non-parties, including any former parties who may have denounced the Treaty.

The Panel drew its conclusions while noting that the reserves will meet the world's needs beyond the year 2000 if geographical distribution is disregarded, but that there is no assurance that the physical facilities for mining, processing and transporting the ore will be available to achieve the high level of production required, or that the political climate will be favorable toward such development or to the desired distribution of the production worldwide.

Although the USSR is self-sufficient in manganese at considerable cost, almost all production comes from too old, declining sources in operation for 70 years. No new, so-called reserves have been put into significant production. The review showed almost no useful manganese in Siberia. The report said that "For the past 25 years, the communist and noncommunist manganese markets could be viewed in isolation from each other, but in the future they must be viewed together." This is because the CMEA countries are increasing imports from the west.

Unlike some other minerals which have a proliferation of sources of production, the noncommunist world has a very limited distribution of manganese mining centres, as alluded to above. There are only five large producing countries, i.e. South Africa, Gabon, Australia, Brazil and India. Since 1955 the market share of these five has increased from 71 to 87% of the Western markets. The tendency of India and Brazil has been to limit exports. The most important exporting mine in Brazil has a remaining life of 6 years. Unless a new source is developed in Brazil, the import reliance of the western nations on Gabon and South Africa will increase. South Africa, which has the greatest reserves in the western economies will, through passage of time, become an even more dominant source of western supply. A sudden disruption from one supply source could not be compensated by greater dependency on the remaining sources except gradually over a period of years.

It has been said that a political change in African sources of manganese supply would have implications for the west because for economic reasons these countries would be compelled to continue selling to their principal market. This simplistic scenario ignores the general degradation of supply that can occur with lessened skilled management, and transport disruptions through dissident activity and continued political unrest. Examples are Zaire and Angola. The Gabon manganese moves through the Congo.

While the Panel did not comment on the long-term political outlook of the African supply countries, it did point out that the USA had several options, one of which was diversification of supply. It said that "ocean mining" is an approach that might attain this objective."

Use of low-grade domestic manganiferous materials was dismissed as not viable, and the self-sufficiency prospects of the USA in manganese are considered low.

Among the industrial implications commented upon by the Panel was the fact that the USA economic ability and capacity to make ferromanganese from imported ores is decreasing (i.e. the ferromanganese industry is moving off-shore) and in fact ferromanganese imports doubled from 1972 to 1978. An important part of this ferromanganese is produced in South Africa, because of economic advantage.

Ferromanganese produced from ocean modules would reduce some of this dependence.

While the Panel's review recognized that there is considerable land-based low-grade material, not now classified as ore, it was not specific that rising prices would bring all this material out of the ground. Most of it is in South Africa, at ever-increasing depths, and it is not assured that the additional investments would be made, unless the investor perceived a stable economical and political scenario. Also, the Panel did not feel that mining and concentrating technology could be improved to make low-grade resources exploitable at existing market prices. An intermediate course of events was deemed most likely; increasing prices will both encourage manganese recovery from ocean mining and elevate some resources to reserves.

In summary, a disruption in manganese supply is a possibility to be contemplated because of the limited number of sources, and this would have serious consequences for the U.S. economy. The long-term outlook is for greater dependence on South Africa and a decline in high-grade ore sources in general. The development of a nationals mineral policy is needed.

Yours very truly,

R. L. L'ESPÉRANCE.

AMERICAN MINING CONGRESS,
Washington, D.C., September 27, 1981.

UNDERSEA MINERAL RESOURCES

The hard mineral resources of the deep seabed are a large untapped source of manganese, cobalt, nickel and copper—minerals of strategic or critical importance to the economy and security of the United States. The U.S. ocean mining industry possesses the technology, capital and skilled manpower to develop these mineral resources but lacks a stable and realistic legal regime under which the major investments necessary for commercial development can be prudently made.

The "draft treaty" now pending before the United Nations Law of the Sea Conference (UNCLOS) fails to provide the essential ingredients for a stable and realistic seabed mining regime and does not protect U.S. interests. We support the current initiative that brings before the Law of the Sea Conference a comprehensive analysis of American difficulties with this text and urge that any future negotiations continue to deal effectively with these difficulties.

The AMC is encouraged by the Administration's launching of its in-depth policy analysis of the draft treaty. We applaud this long overdue review, and urge that the precedential significance of the concept of "common heritage of mankind" as it could affect other international agreements be realistically evaluated, especially as to its impingement upon traditional American philosophy and interests. We urge that this policy review and the evaluation of the 1981 Geneva Session to be combined into a U.S. position for future negotiations.

There has been both public and private misinterpretation of the position of the mining industry with regard to the legal arrangements required for developmental activities and investment in facilities for commercial mining of manganese nodules. Accordingly, we reiterate the industry's position:

(1) Exploration for and commercial recovery of hard mineral resources of the deep seabed are freedoms of the high seas. These freedoms or, as could be stated, "access" must not be removed by any future legal arrangement.

(2) Effective exclusivity to mine nodules from a specific mine site for a specified length of time, under essentially unchangeable and reasonable terms and conditions (Security of Tenure) and under free market economy rules, is a prerequisite to the major investments required in ocean exploration/mining programs.

(3) The threat of de facto expropriation by any treaty entered into by the United States must be effectively removed.

The above basic conditions are not met by the "Draft Convention on Law of the Sea" dated August 28, 1980, and the proposed "Preparatory Investment Protection (PIP)" system that had been under initial discussion at UNCLOS. The draft treaty provides neither access nor Security of Tenure. PIP does not remove the threat of expropriation by treaty. Thus, the draft treaty and PIP do not provide a basis for U.S. industry to invest in either the prerequisite development activities or commercial scale ocean mining operations.

Industry has over the years supported the concept of a generally accepted Law of the Sea Treaty as a vehicle for meeting the basic conditions for investment; however, it is not necessary that such a treaty be either comprehensive or universal. In fact, a comprehensive, universal treaty having serious defects such as the present UNCLOS draft has would be worse than no treaty.

The essential element is agreement on appropriate legal arrangements among like-minded nations to observe similar rules and regulations and mutually respect exclusivity granted by participants. Thus, the recognition by a core of nations having the necessary capabilities to achieve commercial exploitation of a right to explore and commercially mine the deep seabed is an important element in providing a stable legal/political environment. Recognition by a larger group of nations would, of course, enhance the security of such rights.

We continue to believe that a satisfactory investment climate can be created and the basic conditions met by building on the existing U.S. Public Law 96-283. This requires that reciprocating-nation arrangements be established expeditiously.

We urge that every effort be made to complete current negotiations on reciprocating arrangements with nations that have enacted or are contemplating enactment of ocean mining laws. Every effort should also be made subsequently to enlarge the circle of reciprocating nations. After negotiations have been com-

pleted and the first reciprocating-nation designations made, the government should remove present deterrents to investment in the present arrangements, particularly the lack of protection against expropriation by treaty and the prohibition of ocean mining until 1988, and formalize and broaden arrangements with other marine, industrial and consumer nations. Such broader arrangements have been characterized in the past as a mini treaty. Completion of the reciprocating state arrangements could be a basis for continued industrial development activities and interest in commercial investment.

While the best of all worlds would be a comprehensive, universally acceptable treaty, a treaty such as the current UNCLOS draft that fails to protect American interests is no basis for investment. We can easily do without the "comprehensive" and "universal," but cannot do without "acceptable." A utopian universal treaty a decade or two away is too late and of little interest. A practical legal arrangement is what is needed today.

Senator PRESSLER. Thank you very much.

Our next witness is Adm. William C. Mott, Council on Economic and National Security.

Senator HELMS. If I might say so, Mr. Ely, please don't worry too much about what we call bobtail testimony before any congressional committee. I can assure you that the same attention to your testimony will be given as is given to all the rest. There is not an abundance of Senators present here today anyhow, so most of my colleagues will have to rely in large measure on the printed record in any case.

It so happens that I thoroughly agree with you. I spoke with the President a number of times about this treaty. I agree with you that this treaty, if ratified by the United States, would require our Nation to give up rights, including sovereign rights, in the name of international cooperation, and turning it over to the Third World, and all the rest of it.

Let me be sure, Mr. Chairman, of something. The printed text of all the witnesses this morning will be made a matter of the official record and available to all Senators. Is that correct?

Senator PRESSLER. Oh, yes, indeed.

Senator HELMS. Very well. Thank you.

Mr. ELY. Thank you. Senator Helms. I had asked that the letter from Mr. L'Esperance and the resolution of the American Mining Congress be included in my testimony.

Senator PRESSLER. Without objection, it was so included.

Our next witness is retired Adm. William C. Mott, Council on Economic and National Security of the National Strategy Information Center.

STATEMENT OF ADM. WILLIAM C. MOTT (RETIRED), COUNCIL ON ECONOMIC AND NATIONAL SECURITY, NATIONAL STRATEGY INFORMATION CENTER

Admiral MOTT. Mr. Chairman, I am delighted to be able to testify by your invitation.

Let me just say that I may be one of the culprits here in that I was a member of the Reagan task force on strategic minerals. I asked my chairman, Dan McMichael of Pittsburgh, this morning, if I might make public for the first time the fact that the Reagan-Bush strategic minerals task force recommended to the President that the Law of the Sea Treaty should be put on hold until there had been an interdepartmental review to reassess U.S. negotiating posture.

The members of that task force were a distinguished group. They included people like Ambassador Middendorf; Murray Weidenbaum, who is now the Chairman of the President's Council on Economic Advisers, academics, Prescott Bush, the brother of the Vice President, one of Secretary Haig's people at United Technologies, Mr. Oblak, Frank Shakespeare and people of that ilk.

There were some mining company representatives, but there were also user company representatives. Insofar as I know, the decision to make this recommendation to President Reagan was unanimous.

Now there is a review process going on, and to a certain extent the people who have testified this morning have been beating a dead horse, because of the fact that that horse has been put on hold.

I might say that this treaty vehicle has two parts. It is harnessed to Pegasus and a moke. Pegasus is the legendary winged animal that sprang from Medusa, and a moke, as you know, Senator Pressler, is a mule. The mule represents the mining industry interests which are pulling in one direction while Pegasus is trying to fly up into space.

For 25 years, I have been working on getting the Pegasus part of the treaty before the Senate, because as the Judge Advocate General of the Navy, I was very much interested in the navigation parts of this treaty. Everyone in our Government is interested in what Pegasus is hauling, but virtually no one wants the deep seabed mining parts pulled by the moke.

Now, were this incompatible team pulling such a treaty vehicle to come before this honorable body for ratification, our task force concluded, the wheels would come off, and that the treaty would not therefore be ratified. Here is what we recommended, Mr. Chairman, to Mr. Reagan, and this has never been made public:

> The United States should create a seabed minerals policy to establish an economic climate in which U.S. mining firms would be encouraged to undertake the costly, risky, and long-term exploitation of the manganese nodules on the ocean floor. Coordinated with other relevant U.S. policies, this seabed minerals policy should encompass: (a) freedom of access to the seabed; (b) firm agreements to ensure security of tenure for licensed miners to discovered minerals; (c) avoidance of double or excessive taxation; (d) freedom from production or price controls; (e) protection of the marine environment; (f) protection against confiscation; (g) elimination of excessive regulation; and (h) incentives to conduct research and development by industry.

The Reagan administration is now trying to find a solution to deep seabed mining issues, so that it can harness a matched pair to the treaty vehicle before it brings it before the Senate, instead of, as I described, Pegasus and a moke. It is not going to be an easy task, Mr. Chairman, because the seabed mining provisions of the treaty must read, and do read, like a chamber of horrors to any corporation or consortium which is thinking of investing or trying to raise venture capital for such an operation.

I have described that chamber of horrors in my statement, but since Mr. Ely has already gone through it, I won't bother to do it again. But I must take exception to one statement that was made before the committee this morning by Mr. Learson. I was trained as a patent lawyer, Mr. Chairman, and therefore, let me give you a worst case scenario.

Deep seabed mining is a new industry, still in the development stage. If some genius were to come along and invent a revolutionary process for deep seabed mining and patent it, he is guaranteed a

monopoly our Constitution—and I think our Constitution is the only one in the world, Mr. Chairman, which specifically grants to an inventor the rights of his invention. It was done at the beginning of our country in order to form new industries. Mr. Madison, the Father of our Constitution, appointed a committee headed by Charles Pinkney of South Carolina. We were a new country, we had no industries, we needed something in that Constitution to encourage inventors to invent things to found new industries. That is what we are faced with today in the new deep sea mining industry. That inventor, that genius, would have a monopoly for some 17 years. I don't think he could be persuaded, in spite of what Mr. Learson said, to give up valuable patent rights to a supra-national authority over which our courts have no jurisdiction.

I suppose that is why, sir, the president of the Patent Law Association in this country testified before this committee that any competent patent lawyer would have to advise his clients not to transfer patent rights under the conditions of the treaty as they now exist. Hopefully, the conditions can be changed.

Let me give you an analogous situation, Mr. Chairman, that has nothing to do with the Law of the Sea Treaty but is pertinent.

This Congress, with much debate, set aside some 40,000 acres in the State of Idaho, where it is thought there are extensive deposits of cobalt, which might very well make us semi-independent of imports. There will be no cobalt mined out there, as there will be no deep seabed mining, unless the company which owns the rights, which happens to be a Canadian mining company, Noranda, is assured of some kind of a floor price for cobalt. Like the deep seabed mining people, they are not going to put $1 billion into the development of those mines, unless they can convince their stockholders that at the end of the road they are going to make a profit.

That is why Noranda is seeking to invoke title 3 of the Defense Production Act, in order to set some kind of a floor price so that their stockholders will be willing to put money into the development of the Blackbird Mine and the mountain of cobalt that exist in the State of Idaho. But there is no title 3 available to the deep seabed mining industry of this country.

Now, I am not in any sense, Mr. Chairman, a shill for the seabed mining industry, but I am concerned about the sources of supply of critical minerals like cobalt for the industrial and defense base of this country. We need cobalt, and most of it now comes from Zaire. The President of the United States just made the first purchase for the stockpile in 20 years, and where did it come from? It came from Shaba Province in Zaire, and how is it going to get into our GSA warehouses? It is going to come down by rail from Shaba Province, through Zambia, and Zimbabwe, to the port of Durban in South Africa, where it is going to be embarked in foreign bottoms and hopefully, some day it will reach our GSA warehouses. That is not exactly the most secure route that I would choose to commute to work every day.

How important is this? Let me just put it in the words of the Director of Central Intelligence, Bill Casey:

Without these minerals we cannot make TV sets or computers or heart and lung machines, or produce high-grade stainless steel for a thousand uses. The implications for our defense capabilities are just as grim. No supersonic jets and no sophisticated submarines.

Therefore, I regard the treaty issues with respect to deep seabed mining on the same plane of importance to our Nation as the navigational provisions for which I fought for many years. So, I believe, do the Joint Chiefs of Staff and the National Security Council. We should not sacrifice one to gain the other.

Let us hope, therefore, that the administration can come up with a reasonable and satisfactory solution, a matched pair, so to speak, for the treaty wagon, instead of Pegasus and the moke.

Thank you, Mr. Chairman.

[Admiral Mott's prepared statement follows:]

PREPARED STATEMENT OF ADM. WILLIAM C. MOTT

Mr. Chairman, by request of your Counsel, Mr. Tipson, I have been asked to give my views on the current negotiating draft of the Law of the Sea treaty now being reviewed by the Reagan administration. Let me say, first off, that I was a member of the Reagan-Bush Strategic Minerals Task Force which recommended to the President that the Law of the Sea treaty be put on "hold" until there had been an "interdepartmental review to reassess the U.S. negotiating posture." It is my understanding that such an interdepartmental review is now in process and that it should reach the President within the next few weeks.

The problems before such a review committee are vexing, because what they have before them is a treaty vehicle pulled by a team in harness which might be described as the legendary Pegasus and a moke. Everyone in our government wants the navigational and national security parts of the vehicle pulled by Pegasus but virtually no one wants the deep seabed mining parts pulled by the moke. Were this incompatible team to pull such a treaty vehicle before this honorable body for ratification, our Task Force (made up, by the way, of a representative cross section of economists, academics, military men, mining experts and people from the end-user industries) feit the wheels would come off. Therefore, the Task Force recommended the following:

DEEP SEABED MINING

The United States should create a seabed minerals policy to establish an economic climate in which U.S. mining firms would be encouraged to undertake the costly, risky and long-term exploitation of the manganese nodules on the ocean floor. Coordinated with all other relevant U.S. policies, this seabed minerals policy should encompass: (*a*) freedom of access to the seabed; (*b*) firm agreements to insure security of tenure for licensed miners to discovered minerals; (*c*) avoidance of double or excessive taxation; (*d*) freedom from production or price controls; (*e*) protection of the marine environment; (*f*) protection against confiscation; (*g*) elimination of excessive regulation; and (*h*) incentives to conduct research and development by industry.

Presumably, the Reagan administration is trying to find a solution to the deep seabed mining issues so that it can harness a matched pair to the treaty vehicle instead of, as I earlier described it, Pegasus and a moke. It will not be an easy task because the seabed mining provisions of the treaty must read like a chamber of horrors to any corporation or consortium which is thinking of investing or trying to raise venture capital for operations.

The first horror a potential miner discovers when he enters the chamber (after expending a hundred million dollars on feasibility studies for which there is no reimbursement) is that the supra-national "Enterprise" and "Council" with which he has to deal has three Soviet bloc votes to one American, and the American vote may be rotated off but never the bloc votes. How that was agreed to, I'll never understand.

The second horror he encounters is that he will be required to spend another one hundred and fifty million or so dollars in exploration and development of two mine sites, one of which is for the "Enterprise" and other he may apply for with no assurance he'll get a contract.

The third horror is the real treaty stopper under our system of law and business, and I refer to what amounts to a mandatory transfer of technology.

Because I was trained as a patent lawyer, let me give you a worse case scenario. Deep seabed mining is a new industry, still in the development stage. If some genius were to come along and invent a revolutionary process for deep seabed mining and patent it, he is guaranteed both by our Constitution and by laws passed by Congress a monopoly for some 17 years. I don't think he could be persuaded to give up valuable patent rights to an "Authority" over which our courts have no jurisdiction. The same goes for proprietary rights of a corporation. I suppose that is why the President of the Patent Law Association testified before you that any competent patent lawyer would have to advise his clients not to transfer patent rights under such conditions.

There are other horrors mining companies would encounter in the treaty chamber, but the most terrifying to potential investors would be the lack of assured access and the distinct possibility that once access had been granted, production might be cut back by a supra-national Authority, because it was hurting the mineral export business of a far-off, landlocked country. In other words, a penalty for success!

An analogous situation might be the problems a mining company such as Noranda would have in trying to convince its stockholders that it should invest a billion dollars in the development of its cobalt mine in Idaho, absent a guaranteed floor price which would return a profit. That is why Noranda is seeking to invoke Title III of the Defense Production Act. But there's no Title III available to the deep seabed mining companies.

Mr. Chairman, I am not in any sense a shill for the deep seabed mining industry, but I am concerned about sources of supply of critical minerals, like cobalt, for the industrial and defense bases of this country. We need cobalt and our present sources of supply are, to say the least, shaky. Deep seabed mining was to be the ultimate, sure and safe source of supply for manganese, nickel, copper and cobalt. As the Director of Central Intelligence has said recently:

"Without these minerals, we cannot make TV sets or computers or heart-lung machines or produce high-grade stainless steel for a thousand uses. The implications for our defense capabilities are just as grim. No supersonic jets and no sophisticated submarines."

Therefore, I regard the treaty issues with respect to deep seabed mining on the same plane of importance as the navigational provisions. So, I believe, do the Joint Chiefs of Staff and the National Security Council. We should not sacrifice the one to gain the other.

Let us hope, therefore, that the administration can come up with a reasonable and satisfactory solution—a matched pair for the treaty wagon.

Senator PRESSLER. Thank you very much.

Our final witness is William Coffey, chairman, Subcommittee on Maritime Industries of the Law of the Sea Advisory Committee.

STATEMENT OF WILLIAM COFFEY, CHAIRMAN, SUBCOMMITTEE ON MARITIME INDUSTRIES OF THE LAW OF THE SEA ADVISORY COMMITTEE

Mr. COFFEY. Thank you, Mr. Chairman.

I would like to express a few thoughts on the Law of the Sea Conference from a U.S. shipowner's perspective.

I think it is fair to say you probably have not heard a great deal from our industry, certainly in recent years on the law of the sea issue. Thanks to friends in the Department of the Navy like Admiral Mott, and thanks to our own efforts and others early on, I think it is accurate

to state that the views which our industry was seeking to have considered favorably in the treaty largely were included in the treaty fairly early on.

We have been watching, of course, as other interests have had other difficulties, but we have been reasonably satisfied ourselves.

Of course, the President's decision on March 4 to conduct a general review was somewhat of a jolt to us. Our industry certainly supports the President's right and indeed it is a very sensible decision that he has made. Our concern since then has been to urge that the review process move along expeditiously.

I am happy to hear this morning, as I have been hearing in recent weeks, that that process is moving right along. We hope that it will be a productive process, and that the United States will be in a firm position at the next session to present some reasonable alternatives and move this process along. We keep using the analogy, I suppose, of a knit sweater in which a loose end, a very important loose end, but nonetheless a loose end, has been found dangling. It is very tempting to give that loose end a yank, but one might end up with a much longer loose end when one is finished.

We hope that the President and his advisers will complete this process expeditiously, and that the conference will get back on the track again with full U.S. participation. There are a few issues in the draft treaty which I would like to mention briefly that are of particular importance to our industry.

The first of those is coastal State jurisdiction. As Mr. Ely mentioned in his statement, there has been a great deal of change in the traditional 3-mile territorial sea concept. Certainly the treaty does not go back to what we would like to see, namely, a 3-mile territorial sea, but at least it does intend to bring a halt to the creeping jurisdictional encroachment of coastal States; 12 miles is considerably better than 200. The rights of passage guaranteed in the treaty are considerably better than we are afforded today.

As far as the strait and archipelagic state jurisdiction and the questions involving passage through straits, again, it is not a return to the good old days, but the treaty does contain provisions that from the point of view of the commercial shipowner are acceptable. The right of passage through straits is an assured one, a reasonable one, and something with which we can live.

The duties of the flag state are very important. Many, many of the world's vessels, as Admiral Mott mentioned, have foreign bottoms. Many vessels are registered in the open registry of so-called flag of convenience nations. Many of these nations, Liberia and Panama particularly, have taken efforts to insure that the vessels under their flag are properly constructed, manned, and equipped, but there are also other nations that reportedly have not done so.

The treaty will require flag states to take reasonable steps to insure that their vessels are properly operated, properly constructed, and meet international standards. We think that is a very good thing for the seafarers and for those interested in marine environment and in our industry in general.

Regarding port and coastal State enforcement, the United States has led the way probably in adopting unilateral measures which involve the port and coastal States in the standards of the vessels that are either in their waters or using their ports.

We think that the port and coastal State provisions in the treaty again will provide a return to the recognition of the supremacy of international law, and will be required to meet international standards. It will support the work of the Intergovernmental Maritime Consultative Organization, a U.N. body that has done a great deal of valuable work in this area in recent years.

The provisions are not perfect by any means, and yet I think the provisions in the present draft treaty represent the best balancing of the disparate interests involved that are realistically attainable from the perspective of our industry. We hope these can move forward in the very near future. If they don't, I think it is difficult to assess the real impact for owners and operators of U.S.-flag vessels. The demise of the treaty or the failure of the United States to sign the treaty would be a very unfortunate development, but given the present composition of the U.S. merchant fleet, I think it would not be a catastrophic thing.

About half of the fleet are tankers. Most of them are engaged in domestic commerce, and thus are subject to U.S. jurisdiction throughout their voyages. The remainder of the fleet, including the container ships operated by the company that I work for, are engaged in international commerce, but they are typically general cargo ships, container ships, breakbulk ships, or whatever, and they generally do not give rise to the kind of environmental concerns and navigational concerns that the treaty is designed to remedy.

In my opinion, Mr. Chairman, if the Law of the Sea Treaty is not adopted, it is the open registry, the flag of convenience fleets that will have the most difficulties in the near future. Unilateral national standards, uneven enforcement procedures, gaps in flag states' responsibilities, and possible closure of some straits and sea lanes for certain types of vessels are a very predictable result.

As Admiral Mott mentioned in talking about the long voyage of cobalt through railroads, foreign bottoms, and Durban, I was reminded of the New York subway system. [General laughter.]

Mr. COFFEY. But in any case, the foreign bottoms in Durban are the ships that are supplying American commerce in increasing numbers, particularly in petroleum and chemicals. It is the foreign flag fleets on which America is so dependent.

These petroleum and chemicals and coal are of growing importance to our commerce. If the movement of these open registry vessels is significantly disrupted by developments in the Law of the Sea Conference, it is our national economy and our national interest that perhaps will suffer more than any others.

I hope this summary is helpful to you and the committee, Mr. Chairman. I do hope that during your tenure as chairman of the subcommittee you will have before you a draft Law of the Sea Treaty to which our Government and our maritime industry can give its unqualified support.

Thank you very much, sir.

[Mr. Coffey's prepared statement follows:]

PREPARED STATEMENT OF WILLIAM J. COFFEY

Mr. Chairman, my name is William J. Coffey. I am a member of the Department of State's Law of the Sea Advisory Committee, and for the past four years, have served as Chairman of its Marine Industries Subcommittee. I greatly appreciate this opportunity to appear before you and your Subcommittee to discuss law of the sea issues as viewed from a maritime perspective.

As a matter of record, I am employed by Sea-Land Industries, Inc. as Senior Counsel for Public Affairs. Our company and its affiliates comprise the transportation group of R. J. Reynolds Industries, Inc. Most notable of our group is Sea-Land Service, Inc., the world's largest container transportation system, operating 44 U.S.-flag vessels without government subsidy, and serving 180 ports and cities in 52 countries.

You probably have not heard a great deal from the maritime industry in recent years on law of the sea issues. When the Third United Nations Law of the Sea Conference convened in late 1973, the industry did express its views to the U.S. Government on the navigation and marine environmental issues which I will discuss shortly. Generally, these were favorably received and when the first informal single negotiating text was produced in 1975, its maritime provisions were largely acceptable to the U.S. shipping industry, and to our foreign-based colleagues as well.

We watched with interest as other, perhaps more contentious, issues were debated. Finally, by late 1980, it appeared that a successful completion of the Conference within a year or so was possible despite the continuing disharmony over deep seabed mining provisions.

On March 4, 1981, the President awakened us from our reverie by effectively bringing a halt to the negotiating process. Since that time, the Conference has conducted two sessions in what could be termed a holding pattern, while the United States conducts its detailed review of all law of the sea issues.

I am certain, Mr. Chairman, that no one in our industry would dispute the President's right to take a very hard look at the decisions which have been made over the past years, decisions which may have enormous strategic importance as stockpiles of land based minerals and petroleum supplies dwindle and our nation becomes ever more dependent on the sea lanes and the seabed. Certainly, there are problems with the draft treaty. It is far better to resolve them now than to have an unacceptable document sent to the Senate some day in the future when it would fail to receive this Body's advice and consent to ratification.

The review process has reportedly almost been completed. During the past several months, my colleagues on the Advisory Committee and I have had meetings and communications with officials of the State, Commerce and Transportation Departments. We have repeatedly urged them to keep in mind the very real progress which has been made—largely due to the efforts of the United States—in resolving navigation and marine environmental issues.

The present draft, Mr. Chairman, could be likened to an almost-completed knit sweater in which a loose end is suddenly found dangling. A sharp tug will all too often lead to an unraveling of much that has been done, leaving the loose end even longer. We have confidence that the President and his advisors will not allow this to happen.

Let me review the draft treaty issues which are of specific importance to our industry.

COASTAL STATE JURISDICTION

For at least 500 years, it was generally recognized in international law that the jurisdiction of coastal states did not extend to vessels navigating beyond the territorial seas, a zone calculated to extend three miles beyond their shores. By the late 1950's however, a general rise in maritime nationalism, the need for expanded fishing rights, offshore oil production developments, and a spate of marine environmental issues, led many nations to abandon that principle, and to push their territorial sea boundaries to 12, 100 and even 200 miles.

This boundary expansion has lead to a proliferation of conflicting pollution laws throughout the world, and may in the near future result in the establishment of exclusionary zones in which certain types of vessels, such as large tankers and chemical bulk carriers, may be forbidden to transit.

The draft treaty, while not representing a return to the three-mile standard, does hold the territorial sea line at 12 miles, and recognizes the right of innocent passage through those waters. It does allow a contiguous and an exclusive economic zone, but establishes high sea navigation rights for commercial vessel transits.

STRAIT AND ARCHIPELAGIC STATE JURISDICTION

Closely related to the coastal state issue is a growing uncertainty about the continued availability of straits which are used for international navigation, and the passages of commercial vessels through the many archipelagic states. The acceptance of a 200 mile territorial sea breadth in international law, would have transformed virtually every major strait and passage used by commercial and naval vessels from high sea status to that of a territorial sea.

The draft treaty has stabilized this situation, and, while recognizing the particular concerns regarding these areas, has created special regimes—transit passage and archipelagic sealanes passage—for vessels that are engaged in commercial navigation.

DUTIES OF THE FLAG STATE

A very large number of the commercial vessels in service throughout the world are documented in the so-called "open-registry" nations. Others less charitably might refer to them as "flag-of-convenience" ships.

In some of these nations, most notably Liberia and Panama, there is a strong and growing effort by their maritime authorities to insure that vessels flying their flags are in fact properly constructed, manned and equipped. These nations, and the more traditional maritime states, are active participants in the Inter-Governmental Maritime Consultative Organization (IMCO), a United Nations subsidiary body that has led the way toward development of safer vessel and seafaring standards for almost thirty years.

Unfortunately, there are reportedly other nations that have not taken their flagstate responsibilities as seriously. Vessels are allowed to sail in substandard condition, all too often to the subsequent detriment of their crews and the marine environment.

The flag state provisions of the draft treaty would provide a very strong incentive for all nations to adopt and enforce uniform, stringent, international standards for their vessels. It will strengthen the role of IMCO, and give greater recognition to the several Conventions adopted in the past two decades that are intended to protect seafarers and to improve vessel standards.

PORT AND COASTAL STATE ENFORCEMENT

The draft treaty, in strengthening the responsibilities of the flag states, also clarifies the roles of coastal and port states. The coastal state, for example, is authorized to take strong measures in instances where a passing vessel is causing or threatening serious environmental damage. This may include detention of the vessel.

The port state, too, is authorized to seek sanctions against a vessel arriving in its ports that has violated international law. Indeed, the port state is specifically authorized to detain a vessel which is deemed to be unseaworthy, and a threat of damage to the marine environment.

These powers are balanced by due process provisions, including notification of the flag state, and a prompt release bonding procedure. Double jeopardy penalties will also be avoided.

The provisions in the draft treaty which I have just summarized, Mr. Chairman, recognize the critical role that is played by commercial vessels in meeting the world's needs for the oceanborne transportation of materials of every description. They establish reasonably clear rules for commercial navigation in territorial seas, the economic zone, the high seas and in straits and archipelagic waters. They strengthen the authority of port and coastal states, and impose requirements upon flag states that will be a clear benefit to all. They will encourage the continued development of international standards for the protection of the marine environment.

They are not perfect, and yet I suspect these provisions represent the best balancing of the disparate interests involved that is realistically attainable. I sincerely hope that they can become recognized international law within the near future.

What if they do not? Certainly, a premature demise of the Law of the Sea Conference would put these provisions in great jeopardy. Perhaps they could be attained in a separate Convention, but I think this would not be achievable in any reasonable period of time, if at all.

For the owners and operators of U.S.-flag vessels this development would be unfortunate, but given the present composition of the U.S. merchant fleet its effects would not be catastrophic. About half of the fleet are tankers, most of which are normally engaged in domestic service and thus largely subject to U.S. jurisdiction throughout their voyages. The remaining ships are mostly cargo-liners, particularly containerships, and these simply do not give rise to the environmental concerns created by other types of ships.

In my opinion, if a Law of the Sea Treaty is not adopted, it is the open registry fleets that will potentially have the most difficulties in the near future. Unilateral national standards, uneven enforcement procedures, gaps in flag state responsibilities, and the possible closure of some straits and sealanes for certain types of vessels are a predictable result.

We must recall too, that the United States is heavily dependent upon these vessels, particularly for the movement of bulk commodities. Petroleum, chemicals, coal and other minerals are of growing and vital importance in our economy and it is these that are largely transported by open registry vessels.

I hope these remarks are helpful to you and to the Subcommittee, Mr. Chairman. I also hope that during your tenure as Chairman, you will have before you a draft Law of the Sea Treaty to which our government and the maritime industry can give its unqualified support.

If there are any questions, I would be pleased to attempt to answer them.

Senator PRESSLER. I thank the members of the panel very much.

Let me say, as Myron said, in my own relatively short time in Government, my 7 years in Congress, and prior to that my working elsewhere in Government, we have been at about the same place with the Law of the Sea Treaty. It was I who wrote a letter to the President last February asking that a review of the whole matter be taken up. Nevertheless, I think realistically we must begin to think in terms of what we are going to do if there is not a treaty.

Negotiations have gone on for many years, and maybe the new review will result in something that will result in a treaty, but I tend to have become very pessimistic about that happening, realistically.

Therefore, I guess my question is the question I asked the earlier panel. Perhaps each of you could respond or submit a detailed response later. It is possible that we perhaps could begin mining, maybe at an accelerated pace, with a sort of minitreaty or agreement among the great powers? Is it realistic to expect that if we don't enter into a Law of the Sea Treaty, couldn't Japan, Germany, the United States, and Russia just do it, just go out and mine the stuff, and insure their own people that there isn't anything really a maritime power could challenge if the right kind of security were set up?

I know that looks like a selfish point of view, but my question is, could that happen?

Mr. ELY. Mr. Chairman, might I respond to that, since my clients are engaged at this moment in that kind of thinking?

Senator PRESSLER. Please.

Mr. ELY. Right now, there are going on conferences between the American Government and the so-called like-minded states, the industrial nations to which you referred, to explore the possibility of setting up a system of reciprocal legislation. Our statute, passed in 1980, the Deep Seabed Hard Minerals Act, provides for that. Two

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other nations have passed similar legislation, and others are pending. These are making excellent progress.

It is probable that soon after the first of the year this reciprocal regime will be in place, under which each nation will file with the others notice of the locations of its nationals' activities under its license, and asking reciprocal recognition of these licenses.

What you are describing will thus be in existence within a few months. The question then arises, if that regime is in place, will companies in fact operate under it, there being no treaty? We will cross that bridge when we come to it. It will depend a great deal upon the resolution of the respective governments.

Admiral MOTT. I might add, Mr. Chairman, that I think it is unrealistic to include the Soviet Union in such a grouping.

I don't think the Soviet Union ever would enter into any such agreement, because of its peculiar and particular relationships with Third World countries.

Ms. KIMBALL. I think Mr. Ely said if there would be no treaty, that the minitreaty would go ahead, but it seems more likely that there will be an international treaty, in which case the small number of countries signing the minitreaty would be faced with a very difficult situation of two legal regimes. It is also my understanding that some of our European compatriots are not now willing to sign the reciprocating states agreement until the next session of the conference is over, so they would much rather go with the international treaty regime.

Mr. NORDQUIST. Mr. Chairman, I think that will be one of the options that will have to be considered. It could be weighed, also, against another option that there could be first generation mine sites within the exclusive economic zone.

With respect to what the delegation does, and I think we will have a delegation at the next meeting, just as a specific piece of gratuitous advice, I would suggest that it focus on the final articles. Perhaps the portions of the deep seabed text can be severed from the rest of the text without violating the package deal concept.

By that I mean, there may be a way to recognize the reality that there is a substantial portion of the text that is not acceptable and is not ripe for agreement. We could have it settled with respect to the overall package, but perhaps have some procedural method whereby the negotiations could continue on the deep seabed.

Senator PRESSLER. Thank you. I have no further questions.

Senator Pell?

Senator PELL. Thank you, Mr. Chairman.

What also might occur is, that the rest of the nations may move ahead even if the United States stays back; and joined perhaps by West Germany. If that occurs, would that not then mean that our mining people would be faced with a choice of either mining under a foreign flag, as was pointed out earlier, or not mining at all?

I would like to address that question to Mr. Ely.

Mr. ELY. Thank you, Senator Pell. That is a fair question.

Managements of different companies may come to different conclusions, perhaps. I think most American companies would simply get out of this business if the treaty were even signed by the United States. Some companies might reach a different conclusion. We must

realize that this is now a transnational industry. Every one of these consortia has foreign members from several countries.

Kennecott was mentioned earlier. Kennecott is a leader of a consortium. Kennecott now is owned or controlled by British capital. The British own British Petroleum Co., which itself is controlled by the British Government. British Petroleum owns a majority of stock of Standard Oil of Ohio, which bought Kennecott. British Petroleum already had a 12-percent interest in this consortium, so it now controls close to 60 percent of the consortium.

The other companies in the Kennecott consortium include Rio Tinto Zinc (British), Consolidated Gold Fields (British), and the likelihood is that the British Government would put pressure upon the British companies to operate under the treaty. The possibility of loss of several hundred million dollars in a disadvantageous arrangement with the enterprise is no worse than drilling a series of dry holes, and if it is important to British national interests to have Britain sign and ratify the treaty and have British companies operate under it, they well may.

What that would do to Kennecott, I am unable to say, but Kennecott is no longer an American-controlled company.

Senator PELL. Would it not concern you, though, if there were a general regime of law created by the treaty and then there were several holdouts? Doesn't the thought worry you that you would have two competing bodies of law?

I think you as a well-known international lawyer would be particularly concerned about that.

Mr. ELY. Well, it worries me, as a citizen, but if I had the responsibility for management of very large investments, I would do what the managements of these companies will undoubtedly do, say we will not risk our money on the deep seabed under this treaty regime; if we do we are going to lose it; we will put it into something else.

This would be a tragedy for the American public, to have American industry, which developed the technology which has made seabed mining possible, disappear off the map. Probably some companies would rent out their technology to the new masters of the seabed, if I may use that expression, as the American oil companies do in the OPEC countries. There is nothing wicked about that.

Senator PELL. I am sorry, but I can't hear you.

Mr. ELY. I said, it is possible some American companies would indeed rent out their technology to the new masters of the seabed, if I may use a rhetorical expression, just as American oil companies do in the OPEC countries, but that is not an answer for the American people. American mining companies very well make money under the treaty by working for those who will now succeed to the ownership of the seabed.

Senator PELL. But that is the inevitable result if the treaty moves ahead without us. You may be faced with this choice.

Mr. ELY. That choice is one that should not rest with the companies. It is a matter of American national interest. Do we or don't we want to have these seabed resources converted into reserves available to the American economy under the American flag, under American control? Of course we do. That will not happen if the treaty is ratified, and American companies find it impossible to operate under it.

Senator PELL. That is your opinion of what the American national interest is. I think there are those who would say that the American national interest, on balance, is served by the freedom of navigation provisions and other provisions of the treaty, and that these are even more important than the seabed mining.

In that connection, Mr. Nordquist, you expressed the thought that perhaps the various issues could be delinked. It would seem to me if you delink the deep seabed mining from the treaty, and just had all the other provisions, then that would really be a wonderful treaty from the viewpoint of the United States. It would be heads, we win, tails, you lose, to the other countries. There has to be a certain give and take. Do you really think the rest of the world would accept the giving up, that other countries would for example grant freedom of navigation to transit their straits and without getting something in return?

Mr. NORDQUIST. I think it depends on how that is handled and whether there is real confidence that the United States is negotiating in good faith. I don't think we should accept the idea that those options are precluded from the delegations. If U.S. noninvolvement is seriously accepted, which I believe it is, and the good faith desire of the United States to find a way out that is acceptable to everybody is accepted, and I think it can be if it is handled properly, then I don't think we should preclude the idea that there may be a way to narrow negotiations down to just focusing on the deep seabed. Perhaps all 150 nations don't have to come for these extended periods. But maybe there is a different kind of negotiating process.

I would not rule out sufficient ingenuity at that Conference to find a way to deal procedurally with this kind of problem. It has been one of the most innovative conferences in this respect that ever has been.

Admiral MOTT. I would add just a word.

Senator PELL. Please.

Admiral MOTT. I think Mr. Ely has made a very important point here which often is overlooked. It is this: We want the seabed minerals not for the mining industry, but for the industrial and defense base of this country, the user industry. Mining companies don't mine in a vacuum to make huge piles of cobalt and copper. They mine for the industrial and defense base of this country, the user industry. That is what is important for the future.

We have to have some kind of assured source. You mentioned Germany. The great fear of some of our policymakers today is that Germany, which does not have a stockpile, and is much more dependent than we are on the source of these critical minerals, is about to make a deal with the Soviet Union, which we are concerned may include a source of supply of critical minerals from the Soviet Union, thus making Germany more dependent on the Soviet Union than they will be with the gas pipeline.

Mr. ELY. Senator Pell, might I add one point?

Senator PELL. Mr. Ely?

Mr. ELY. If it should come about that the administration and ultimately the Senate and the Congress should decide that the advantages of this treaty are so great in other respects that seabed mining should be sacrificed, that is a major policy decision to be made by the Government, obviously, and not by mining companies.

What I am saying is, don't be under any illusions that the tradeoffs now appearing in the treaty have left the United States with a viable deep sea mining industry. They have not. There will be no American mining industry under this treaty, I assure you. There may be foreign industries, subsidized foreign state-owned mining companies, but the tradeoffs in this treaty in order to obtain other advantages which may or may not be flawed, have not left us with a viable deep sea mining industry.

On some occasion, if there is opportunity, I would like to really explore the value of these tradeoffs. It is assumed that the rest of the treaty is gilt-edged, 24-carat. It is not. There are serious flaws in it with respect to navigation, judicial review, many other factors, but some of them I wouldn't care to go into except in executive session.

But do not assume that the rest of the treaty is 24-carat. It is not.

Senator PELL. Thank you very much.

Senator PRESSLER. I thank the panel very much, and I will call this hearing to a conclusion.

[Whereupon, at 11:50 a.m., the subcommittee adjourned, subject to call of the Chair.]

APPENDIX

The "Reagan Reassessment" in the UN Law of the Sea Conference[1]

(By John J. Logue, Director, Common Heritage Institute, Villanova University)

On the eve of the recent New York session of the UN Law of the Sea Conference Secretary of State Alexander Haig instructed the U.S. delegation to the Conference "to seek to insure that the negotiations do not end at the present session of the Conference, pending a policy review by the United States." Secretary Haig's instructions startled and angered many delegations since all of them knew that at the end of the previous session Ambassador Elliot Richardson, then head of the U.S. delegation, had predicted that agreement on a treaty draft would come at the New York meetings.

On March 9, the opening day of the New York meetings, Washington dropped another bombshell. In that "Monday Morning Massacre" some of the highest ranking members of the U.S. delegation were fired in order, as Richardson's successor, James Malone, would later put it, "to ensure that other nations clearly understood our seriousness of purpose with respect to the review."

During the six week New York session the U.S. delegation spent most of its time treading water. So did most of the other 160 or so nations participating in the giant Conference. Near the end of that spring session the U.S. announced that its review of the Draft Convention would not be finished until the fall of this year. For that reason, Washington said, the U.S. was opposed to holding a resumed session of the Conference in Geneva this August. Unwilling to allow one nation to "dictate" to the Conference, the majority of participating nations scheduled a four (or five) week Geneva session anyway. The U.S. will attend but, unless things change, will once more refuse to approve a treaty text.

Needless to say it is still a dangerous enterprise to speculate about these developments and especially about what may follow from them. Nevertheless it may be useful for a veteran observer of the Conference to state publicly his impressions, if only to stimulate further and, hopefully, more productive discussion of the very important questions which the Reagan reassessment has forced us to consider. Let me say that in my view it is time for non-specialists to take a close look, a searching look, at the Law of the Sea Conference and to see what the participants in it have done with this unique opportunity to affect the international political system in a very positive and constructive way. The Law of the Sea Conference is far too important to be left in the hands of the delegates, the governments and the tiny band of academics, NGO's (i.e. nongovernmental organization representatives), media representatives and ideologues who follow its deliberations.

The conventional liberal account of these rather sensational developments is that the Reagan Administration threw a monkey wrench into the seven year old Conference just as it was about to reach agreement on a workable, acceptable and desirable treaty. In this paper I would like to challenge that account on several grounds.

First, I would say that even if the U.S. had "behaved", i.e. had supported the Draft Convention—or something quite like it—agreement on a text at the spring meetings was by no means a foregone conclusion. I will elaborate on this point at some length. Second, I would respectfully suggest that the Draft Convenant in its present form is not really a workable treaty. I will elaborate on that point too. And last, but not least, I would stress my view that the Draft Convention is not, in its present form, a very desirable treaty. Although William Safire has repeatedly called the draft treaty a ripoff of the United States it is, in fact, a ripoff of most

[1] This is a revised version of the paper Dr. Logue presented at the March 1981 annual meetings of the International Studies Association. He has attended each of the ten sessions of the Law of the Sea Conference.

low income countries by the United States and a few other geographically fortunate states. It is a treaty heavily weighted in favor of a few rich countries and a few poor ones, a treaty whose overall impact, as Arvid Pardo has pointed out, it to reinforce the old economic order rather than be the major step toward a new international economic order which the Group of 77, the caucus of developing nations, hoped it would be. Pardo, the former Maltese Ambassador, is universally acknowledged as the father of the Law of the Sea Conference.

The effect of the Reagan monkey wrench was—and is—to allow the Administration time—a pause, if you will—to make a searching examination of the treaty and to judge whether it adequately serves the national interest of the United States. If the answer is in the negative it is to be hoped that the Reagan Administration will suggest ways in which the treaty can be improved. I would like to suggest that two can—and two should—play this game of "pausing for reassessment." Certainly the Group of 77 can and should play that game. Indeed all of us should play it. For a major trouble with the Conference is that only a tiny handful of people are following—or indeed can follow its incredibly complex discussions. If, during that pause, more people look at the treaty, they may, and hopefully, will demand that it be improved.

FAULTS IN THE CONSERVATIVE CRITIQUE OF THE TREATY

As I have indicated a major purpose of my paper is to challenge the conventional liberal wisdom about the Reagan retreat from the Draft Covenant. However I want it to be very clear that my own perspective on the draft treaty is very different from that of the new Administration. The new Administration believes that the Draft Covenant is too liberal, too internationalist. In my judgment the Draft Covenant is far too conservative, far too nationalistic. It is a nineteenth century document for a world which is about to enter the twenty-first century. It reflects a very narrow, very nearsighted view of what is in the national interest of the participating nations, whether rich or poor, developed or developing.

Some of the conservative critics of the treaty reflect a naive laissez-faire ideology which is contradicted by American behavior under Democratic and Republican administrations, past and present. Thus while it is evil to have production limitations on deep seabed nodules it is perfectly permissible to have acreage allotments for American farm products. Price floors on nodules are sinful but for some reason they are perfectly alright on tobacco. We must have free competition among nations when they mine nodules but not, heaven forbid, when they produce automobiles! It would be wrong to have commodity agreements on one or more of the constituent metals in those nodules (i.e. manganese, copper, cobalt and nickel) even though the U.S. is already a party to international commodity agreements on other resources.

There is also a persistent confusion between the argument, a very persuasive one from my point of view, that the U.S. must develop the capacity to mine the deep ocean and, a quite different point,that the only way to develop that capacity is to have a regime in which U.S. companies will be sure to make a profit from that mining. There are really two quite different points. A nation can need—and build—an Army or Navy without expecting that Army or Navy to make a profit. The same thing is true of a nation's merchant fleet. You can be sure that some of the Senators who argue that our deep seabed miners must make a profit, if they are to survive, pride themselves on the fact that they vote the American merchant marine a subsidy of close to a billion dollars each year.

I find the national interest argument for subsidizing the merchant marine a persuasive argument. If we get into a war, many foreign owned vessels may be unavailable to us. We should have a substantial U.S. merchant fleet even if that requires, as it apparently does, subsidization. By the same token it makes sense to subsidize the U.S. deep seabed mining industry if—which is by no means inevitable—it cannot survive financially without such a subsidy. Our trains, our buses, our subways would go out of business if we did not subsidize them. I do not hear their management, their workers, their suppliers or their users refusing those subsidies or praying Adam Smith or Professor Milton Friedman for forgiveness as they accept them. Mind you, I am not advocating subsidies for our deep seabed miners. I am just suggesting that we may eventually make a prudent judgment that they should be subsidized.

Let us take one final argument of the treaty critics—and of some treaty supporters. It is alleged that we have, under international law, a high seas right to mine the deep ocean, a right which we cannot be deprived of without our con-

sent. But the same logic can be used to reach the conclusion that the Soviet Union has a high seas right to fish off Massachusetts, a right which it cannot be deprived of without its consent! With straight faces U.S. diplomats maintain that the U.S. can deprive 159 other countries of their high seas rights but that the same 159 nations cannot deprive us of our high sea rights!

Having thus distanced myself from many of the conservative critics of the Draft Convention I should add that I have an impression that there may be something to their contention that the Draft Convention makes the "critical path" to access to the deep ocean too complex, too negative. I speak of my "impression" because—like almost all of the U.S. Congress, almost all of the members of the press and indeed almost all of the members of the Conference itself—I am not a close student of this incredibly complex part of the Law of the Sea debate.

Whether they are right or wrong on this question of access, I would add that most of the conservative critics of the treaty have little feeling for the potential of a really good law of the sea treaty for improving the international political and economic situation, for helping to bridge the gap between North and South and for bringing about an improved political climate in which a new and more effective effort can be made to tame the terrible arms race. That is to say few of them have the imagination and the vision of an Arthur Vandenberg or a Paul Hoffmann or a George Marshall or a Jean Monnet. And our country and the world is the poorer because they lack the far-sighted vision of the national interest—and the human interest—which those men had.

I may seem to be suggesting that liberal champions of the treaty have shown vision and imagination. Far from it. They have certainly shown ingenuity and inventiveness. Witness the unbelievably complicated—and probably unworkable—arrangements in the 36-nation Council. Instead of using the precious months of the Reagan reassessment to improve a very nationalistic treaty they are parroting the argumentation of the geographically fortunate states who insist that that any substantial changes will destroy the "delicate balance" of the Draft Convention. In last summer's plenary a Swedish delegate pointed out how self-interested the "delicate balance" argument is.

The Draft Convention is certainly better than no treaty but that is not the question. The question is whether the delegates can and will use these crucial months to make necessary improvements in a very inadequate treaty draft.

You will recall that my first challenge to the conventional liberal wisdom about the Conference was its assumption that the Draft Convention or something like it—would have easily sailed through this Tenth Session if it were not for the Reagan monkey wrench. I am frankly very skeptical about this. I am skeptical as a result of talks that I had with delegates before the monkey wrench was hurled. I am skeptical because I have read—and read closely—the summary records of the August 25–27 Plenary Debate on the package which would become part of the Draft Convention a debate in which some 120 countries participated. I am skeptical because I have looked closely at key provisions of the Draft Convention and I judge that they are really unworkable.

I imagine that most of you read the newspaper and magazine accounts which told the world of the great "breakthrough" in the Geneva Session. But have you read the Summary Records of what the Delegates actually said? My guess is that most of you haven't. I say that with some confidence because of the simple but incredible fact that the Law of the Sea Secretariat did not, even six months after the Geneva session, make those Summary Records available to academics, to the press or to the nongovernmental organization representatives in New York. The Summary Records were available in Geneva but only after the delegates had gone home. If you had the airfare, you could fly over there and get copies of them but you could not get them in New York even though they are a precious and invaluable resource which should have been available in New York six months ago. The Secretariat will not spend the few hundred dollars necessary to reprint the records of the Conference. However it is prepared to spend and it sought and received—the consent of the General Assembly to spend thousands of dollars to tell the world why the Draft Convention is a splendid document. I suggest that some of the Secretariat's money should have been used to make the Summary Records available to those interested in the Conference's deliberations. If it had, there would have been a much more realistic assessment of the chances for agreement on a treaty at the New York session. Those chances were not good.

After that well-deserved slap on the wrist of the Secretariat I want to indicate some of the things one could have learned by reading the Summary Records of

the Geneva Plenaries. For example at least thirty countries indicated that they did not like the agreement on voting majorities which is now contained in the Draft Convention. Many countries disagreed with the article in the convention which deals with the delimitation of boundaries between opposite and adjacent states. Some forty countries indicated they wanted the convention to limit the freedom of warships to transit the 12-mile territorial sea provided for in the Draft Convention. I would judge that twenty countries objected to the fact that small and medium-sized industrial states are, or so they assert, frozen out of membership in the powerful Council of the Authority even though those states have to put up a substantial amount of the financing for the Enterprise, i.e. the operating arm of the Seabed Authority. A number of states indicated their feeling that the Convention's provisions for sharing of living resources in the 200-miles exclusive economic zone (EEZ) with neighboring (but geographically disadvantaged) states were weighted heavily in favor of the coastal state. A number of other states, some of them members of the Conference's Group for the Common Heritage Fund, continued to insist that the Conference should provide for some sharing of the oil and gas revenues in the EEZ, resources which, under traditional international law, were regarded either as "common property" or as "no one's property." Farther on in this paper I will discuss in more detail GCHF's searching critique of the Conference and the arguments it raises in supporting its bold and imaginative proposal.

In a word there was considerable skepticism about the Draft Covenant in the Geneva Plenary Debates. Of the more than 160 nations in the Conference very few said that they endorsed the agreement on voting which was the key element in the much-publicized "breakthrough." What many of them said was something very different, i.e. that they did not object to the compromise becoming part of the new negotiating text.

Is the Draft Convention a workable treaty? At the moment the focus of public attention is on whether private and state companies will get "assured access" to deep seabed minerals. But I would like to direct your attention to two other features of the Draft Convention and to some authoritative commentaries which have been made on it by Ambassador Elliot Richardson and others. The first feature is a very simple but very startling one. It is the fact that at Geneva it was agreed that the Rules and Regulations of the International Seabed Authority, an absolutely essential feature of the law of the sea package, would not be adopted until after the treaty is signed—with great ceremony and great rejoicing—in Caracas. The second curious fact is that decisions with respect to the rules and regulations of that Authority are to be made by "consensus," i.e. by unanimous agreement of the members of the 36-nation Council.

Here I want to focus on two separate points. The first is whether it makes any sense to sign a treaty when an essential part of the treaty is missing—and purposely missing. Of course, this approach has one great virtue. It allows you to end the Conference and to call it a success without anyone really knowing whether it will be a success or indeed whether it will even get off the ground. To those with an historic perspective the hosannahs which greeted the alleged breakthrough and the cheers that would have come had the treaty been signed—are a rather grim reminder of the enthusiasm which greeted the Kellogg-Briand Pact of 1927. In that pact the signatories agreed to renounce war as a means of settling disputes. While famous people were praising that pact, it seemed positively churlish to suggest that it would not really be meaningful unless it was part of a much larger and much more complex arrangement for strengthening the very weak structure of the League of Nations. At the risk of alienating some of my dear friends in the Conference and in the NGO community, I would like to suggest that what the Conference leaders were planning to do—to sign a treaty, to declare a triumph and then hope that the Preparatory Commission would work things out—bears an uncanny resemblance to Senator Charles Aiken's famous suggestion as to how to end American involvement in the Vietnam War. Neither President Johnson nor President Nixon wanted to be the first American President to lose a war. Aiken's solution was simple: "Declare a victory and get out."

Don't misunderstand me. I think there is a good deal to be said for ending the Conference. And there is a great reluctance for the Conference leaders, or for anyone connected with it—and here I would certainly include Secretary-General Waldheim—to say we can't reach agreement so we'll recess the Conference and then see whether we can work out agreement in a smaller body. But that would, I suggest, have been more accurate and—shall I say it?—more honest.

What probably would have happened if the Draft Convention had been approved is that the nations would not have reached agreement on the rules and regulations of the Authority. I respectfully suggest that many people would conclude that they had been taken in by the public relations gimmick of nations signing a treaty which probably would not be ratified by enough countries and might not even be submitted for ratification by the United States.

I respectfully suggest that it would be more honest to get agreement on the rules and regulations of the Authority before signature of the treaty. If you can't get it before signature, you almost certainly can't get it after. Indeed it may well be more difficult to get agreement after signature than before it. For if the Conference is in session (or in recess) it may be possible to change parts of the treaty package in exchange for agreements on certain of the rules and regulations of the Authority. But if the Conference has adjourned there will be much less possibility for bargaining and thus for creative compromise.

Thus far my focus has been on the premature signing of the treaty. But I want to add that some of the results of the compromise on the decision-making are, in my judgment, very undesirable, indeed, are unworkable. I refer to the provision for consensus decision-making on certain matters by the Council of the Authority, e.g., the rules and regulations of the Authority, the distribution of benefits and the provision of assistance to states adversely affected by production of hard minerals from the deep seabed. It is very unfair to require consensus, i.e. unanimity on those questions which are of great importance to Third World countries, when the treaty provides for "reverse consensus" on the important question of approval of work plans of corporations which want to mine the deep ocean. For if the Legal and Technical Commission has approved a work plan, it is regarded as approved by the Council if only one country—other than the sponsoring country—votes in favor of the work plan even if all the remaining 34 countries vote against it!

Our common sense tells us that while consensus voting may be a good way to run a conference it is no way to run a railroad or a legislature or a seabed Authority. When Nikita Khruschev proposed a three-headed Secretary-Generalship, his famous troika, i.e. three secretaries-general, each with a veto, we all knew it was unworkable. But somehow we pretend—to ourselves as well as to others—that an institution with 36 vetoes is a major step forward. We really know better. Thus it is very important these provisions be modified so that smaller majorities, e.g. ⅔ or ¾, are provided for decisions in the areas which now require consensus.

The last point on which I promised to elaborate was my contention that the Draft Covenant is not a very desirable treaty. I do not regard that as a very difficult assignment. For the Conference ignored Arvid Pardo's plea that a very substantial amount of ocean mineral wealth be made available for international community purposes and particularly to help developing nations. In his famous Common Heritage Speech, which he made in the General Assembly's First Committee on November 1, 1967, the Maltese Ambassador repeatedly stressed that the common heritage area should begin "beyond present national jurisdiction. He was aware that the overwhelming proportion of ocean mineral wealth, i.e. in dollar value, is within 200 miles of shore. But the General Assembly deliberately rejected Pardo's advice.

In the Draft Law of the Sea Treaty it put forward in August of 1970 the United States boldly and generously proposed that all the area beyond the 200-meter depth line be regarded as "the common heritage of mankind." It proposed that between 50 and 66 percent of the immense revenues that could be expected from the outer margin, i.e. the area beyond 200 meters, would go to the international community. The General Assembly deliberately left out Pardo's adjective "present" (i.e. present national jurisdiction) and carefully and deliberately wrote in the elastic phrase "beyond national jurisdiction", a phrase it deliberately refused to define. The almost inevitable result was that before the Conference met and while the Conference was meeting—and in spite of the Conference's pleas—the coastal states grabbed more and more of Pardo's common heritage. Meanwhile within the Conference a few very articulate states helped persuade the Third World that a 200-mile exclusive economic zone would be in the interest of the Third World.

Only recently have the mass of Third World states begun to understand that as far as mineral resources go the overall effect of the EEZ will be, as Pardo has said, to make the rich richer and the poor poorer. It will give to a very few rich states and a very few poor or not so poor states immense riches which were, under traditional international law, regarded as either "common property" or as "no one's property."

In recent years Third World states have begun to realize that if they had followed Pardo's advice they would be getting, according to Pardo's own calculations, as much as twenty billion dollars a year to assist their development plans. (**Note.* In his 1967 speech Pardo predicted that by 1975 there would be five billion dollars a year available for international community purposes. Since oil prices at that time were less than three dollars a barrel the figure twenty billion dollars a year is obviously a very conservative one.) Meanwhile Third World states have also begun to understand that the amount of money available to the internationl community from the Draft Covenant will be, in the words of Undersecretary-General Zuleta, "peanuts," perhap 500 million dollars a year, beginning ten years from now.

Obviously I cannot say with any certainty what will happen when the Reagan Administration finishes its review of the Draft Convention and makes, as it almost certainly will make, demands that the "critical route" to access to deep seabed minerals by private companies be simplified. It may be that the Third World will reject the Reagan demands out of hand. If so, that may well mean the end of the Conference. A second possibility is that the Third World will accept the new U.S. demands and ask nothing in return. A third possibility—and I think the most likely one—is that the Third World will demand something in return.

What will that "something" be?

Many possibilities occur. But almost all of them cancel each other out. There are many things which a few or more than a few Third World countries want. However, typically, another sizeable portion of Third World countries wants the opposite. Is there, then, any proposal within the Conference which would benefit directly and substantially most Third World countries and would require substantial contributions from only a few of them, and only from the most prosperous among them. There is one such proposal. It is, of course, the Common Heritage Fund Proposal. That proposal would provide for some sharing not only of the relatively unimportant wealth of the deep ocean and the outer margin (i.e. the margin beyond 200 miles) but also and especially some sharing of the much more important mineral wealth of the EEZ.

Because the CHF Proposal might soon provide as much as five billion dollars a year for international community purposes it would be a major step toward the "substantial, regular and assured financing" which the Brandt Commission, UNCTAD, the General Assembly and many other bodies regard as essential to Third World development. It would be a major step toward the realization or at least partial realization of the New International Economic Order about which there has been so much talk but so little action.

The Common Heritage Fund Proposal would be an appropriate trade-off for the "assured access" which the Reagan Administration is almost sure to demand from the Conference.

But what chance has it of being adopted?

At first glance the Proposal would seem to have very little chance of being adopted. Even though there are strong arguments that it would be in the interest of the rich nations as well as the poor ones it would be very difficult to convince the Reagan Administration of this, not to speak of the Thatcher Government or, indeed, the Norwegian Parliament. The job of getting the Third World united behind the Proposal would probably be even more difficult. The major obstacle to getting united support for the CHF Proposal in the Third World isn't, as with the rich nations, greed. It is rather a sincere but, in my judgment, simplistic theory of state sovereignty which says that it is a derogation of state sovereignty and thus of state dignity if a state agrees to make a required contribution, however small, from its resources to an international organization. It is true, as the GCHF has pointed out, that the Draft Convention already provides for sharing of the "sovereign resources" on the portion of the margin beyond 200 miles from shore. It is also true that sovereign states frequently sign treaties which modify in important ways their sovereignty. Nevertheless it is this insistence on a rather narrow interpretation of state sovereignty which is the major obstacle to unity in the Third World on the CHF Proposal.

I would like to conclude this examination of the Reagan retreat and its potential for good and for evil with several quotations from the Statement which the Group for the Common Heritage Fund adopted on March 5, 1981 and addressed to the Group of 77. The Statement suggests that there is still time to make the Law of the Sea Conference the great step toward peace, justice and environmental sanity which we hoped it would be. There is still time, courtesy of Ronald Reagan—of all people—to see that the Treaty of Caracas means as much for the world

as the Treaty of Rome meant for Europe. However that will require a much bolder and much more imaginative treaty than the Draft Convention and there is not much time.

A Statement of the Group for the Common Heritage Fund

(This statement, addressed to the Group of 77, within the Law of the Sea Conference, was adopted in New York on March 5, 1981, on the eve of the Tenth Session of the Conference).

Four intersessional meetings of the Group for the Common Heritage Fund have renewed our conviction that our proposal for a small "common heritage contribution" from immense mineral wealth of the exclusive economic zone is more urgent than ever. Incorporation of the CHF Proposal in the Draft Convention in this session would be a major step toward the creation of the New International Economic Order which is the most important goal of the Group of 77. It would provide developing countries with the substantial, predictable and continuous source of development capital which UNCTAD, UNIDO, the General Assembly and the Brandt Commission have all said is essential to their development.

Outside the Conference we have witnessed the frustration of last summer's Special Session on Development and the postponement of the hoped for Global Negotiations on North-South economic relationships. Meanwhile, as the Brandt Commission has pointed out, the needs of the developing countries are more urgent than ever. Inside the Conference we have seen incorporated in the new treaty text provisions which subject to a 36-nation veto the sharing of the meager benefits that can be expected from the Area and from the portion of the continental margin beyond 200 miles from shore. The Draft Convention gives coastal states "sovereign rights" not only to the more than thirty trillion dollars worth of oil and gas within the EEZ but far beyond the EEZ as well.

Since those EEZ resources were, under traditional international law, either "common property" or "no one's property" it seems morally appropriate that a small portion of the revenues from the EEZ be paid into a Common Heritage Fund, the major purpose of which is to aid Third World development. Required contributions to the Fund would be graduated to the "relative capacity of States to make such payments and contributions." Only the richest states would have to pay the full rate. If low income developing nations would have to make any contribution, it would be very small, serving a largely symbolic purpose. We cannot help reminding the members of the Group of 77 that it is a small group of developed countries which gain the most from the EEZ, the area which contains the overwhelming portion of the oil and gas of the oceans, wealth of immense value. A recent study has indicated that ten countries, only ten countries, will get 53 percent of all the EEZ of all nations. Of those ten countries six are rich and three are of middle income. Only one low income country can be found among those top ten gainers from the EEZ. It is also clear that it is the high income countries which will be doing the exploiting of seabed resources wherever they are found.

We have repeatedly stated our view, a view which Arvid Pardo, the father of this Conference has also frequently stated, that the overall impact of the EEZ and continental shelf provisions of the treaty is to strengthen the old economic order. Do not misunderstand us. We are not against the EEZ. Indeed we favor it. However we think it is essential to add one more obligation to the list of obligations in the EEZ which are already incorporated in the draft convenant, namely an obligation to contribute a small portion of the mineral revenues from the EEZ to the international community through the device of the Common Heritage Fund. We are aware that the Draft Convention gives the coastal states "sovereign rights" to the mineral resources of the EEZ. We have no quarrel with that. We would respectfully point out that the same Draft Convention gives the coastal state "sovereign rights" to the mineral resources of the outer margin, i.e. beyond the EEZ. However the Draft Convention requires the coastal state to make a contribution to the international community from those same "beyond 200" resources. We believe that it is reasonable to make the same requirement within the EEZ.

We are not, at this pre-session meeting of the Group of 77, asking the Group to endorse our Proposal. We are simply asking the Group's members, all the Group's members, to take a new look at it, a new look free from prejudgment. If you do, we are convinced that you will agree with us that it presents a marvel-

ous opportunity, an opportunity which must be seized, to take a major step toward the New International Economic Order which the Group wants to achieve. We will be most happy to explain any provisions of the proposal, including the new ceiling on contributions. We remain, as we have been in the past, ready to listen attentively to any suggestions as to how the proposal can be improved.

SPEECH BY JAMES L. MALONE, ASSISTANT SECRETARY OF STATE FOR OCEANS AND INTERNATIONAL ENVIRONMENTAL AND SCIENTIFIC AFFAIRS AT THE UNIVERSITY OF VIRGINIA'S OCEAN POLICY FORUM, WASHINGTON, D.C., NOV. 12, 1981

Thank you very much. It is a pleasure to appear before this forum to report on the status of the law of the sea negotiations. As I am sure all of you know, the Executive Branch is now in the final stages of its review. I am, therefore, not yet in a position tonight to describe our future course of action.

I would, however, like to try to share with you some of my thoughts on the dilemma which the U.S. faces with respect to the Law of the Sea Conference.

When this Administration took office ten months ago, it was reasonably clear that the Draft Convention on the Law of the Sea left much to be desired. This Administration believed it prudent to review the Draft Convention with great care and to obtain the advice of wide segments of American opinion.

There are those who feel that a realistic assessment of the progress of the Conference to date makes it highly unlikely that despite best efforts on both sides it will be possible to conform this treaty to all U.S. objectives. They point out that, in order to meet U.S. interests, the draft treaty would have to be transformed into a document which fosters the development of deep seabed mineral resources, avoids monopolization by the Enterprise, establishes a system of political governance commensurate with our perception of America's role in international affairs, avoids unjustifiable regulatory interference in mineral development, allows free market principles to operate and is incapable of being amended without U.S. consent. The draft treaty falls short of meeting these goals.

At the last session of the Conference in Geneva, virtually all delegations cautioned the United States against attempting to modify the compromises which had been agreed to by prior American delegations. If we were to follow that advice scrupulously, it is clear that none of the objectives I have just enunciated would be achieved and we would once be again in the position of being confronted with a treaty which has little prospect of obtaining the advice and consent of the Senate. If we fail to follow that advice, we are told the Conference will adopt the treaty in its present form and open it for signature.

We are aware that virtually all nations are anxious to conclude this treaty in the interest of concluding the Law of the Sea Conference and stabilizing a legal regime for the oceans.

But we decided that it would not be right to continue and to conclude negotiations on a treaty in which the U.S. probably could not participate. Many countries criticized us for slowing the schedule of negotiations. However, I believe that the decision has been shown to have been a prudent one. Many of the misgivings we had at the beginning of the review process have been borne out. I would note that several other countries have used the time to carry out their own policy review.

The Interdepartmental Group has now completed the review of the U.S. law of the sea policy and has prepared an options paper for the President. This has been circulated to the Senior Interdepartmental Group for formal, policy-level agency comments. The paper will be submitted shortly to the President for a decision on our future course.

The issues have been complex and difficult but the review process has been useful. It has been our aim to complete the review and submit our findings and recommendations to the President as quickly as possible so that, if the President directs that we return to the LOS negotiations, there will be adequate time to prepare.

While we do not yet have final views of all concerned agencies, a number of problems with the deep seabed mining regime envisioned by the Draft Convention have been identified. For example, it could lead to monopolization of deep seabed mineral resources by the international Enterprise. Monopolization would be harmful to U.S. security of supply and to the efficient development of resources. The regime would not give the United States a decision-making role in the seabed institutions which fairly reflects U.S. political and economic interests and financial contributions. As a result, U.S. interests could not be protected effectively.

Additionally, the Draft Convention would permit amendments to Part XI of the Convention to enter into force without the approval of the United States,

thus avoiding the constitutional requirement for the advice and consent of the Senate.

The Convention also contains provisions which raise serious political and commercial difficulties, including funding for national liberation movements and mandatory transfer of private technology. Such provisions alone could prevent Senate advice and consent.

It seemed clear from our discussions at the August session in Geneva that the Conference is willing to make some changes in the deep seabed provisions to accommodate some U.S. concerns.

It is difficult to make a definitive assessment as to how far other nations would be willing to go to accommodate U.S. interests. In large measure it will depend on how the Group of 77 balances their commitment to all aspects of the current version of the Draft Convention against their desire to have the U.S. participate in the treaty. We have been told that the developing countries are not prepared to negotiate with us until we have made a commitment to the treaty process. We have also been told that they will not accept fundamental changes to Part XI. In addition, we understand that the Conference has established a deadline for the completion of negotiations which allows only a few weeks for negotiations before the Conference begins its formal decision-making process.

As I have said, the White House has not made any final decision on our future course and the best method for protecting American interests. In the near future, we will have a decision and the Executive Branch is prepared to take prompt action to implement the decision. If the President decides that the United States should seek to negotiate improvements in Part XI, it would be important for us to consult with our allies, leaders of the Group of 77, and other Conference leaders to determine the best approach to such negotiations.

In doing so the United States should have to be mindful of several factors. First, in the view of many participants, the negotiations had been virtually completed at the time the United States announced its review. Most Conference participants have indicated that it would not be possible to make changes that are inconsistent with the fundamental approach and structure of Part XI.

Second, the Conference has organized its work program so as to make it possible to complete negotiations, adopt the Draft Convention and open it for signature sometime in 1982.

Third, some in the Third World may have concluded that there is no possibility of finding a solution that meets United States objectives. Indeed, some countries may be contemplating adopting the Convention over United States objections in the hope that eventually the United States will be induced to participate in the treaty. Our allies have made it clear, however, that United States participation is essential to a law of the sea treaty.

I believe, therefore, that if the United States chooses to return to the negotiations, and if its approach is respectful of the desire of the most delegations to complete the work of the Conference in 1982, important improvements might be possible.

I have tried this evening to shed some light on the concerns underlying the U.S. policy review and some of the factors that will be weighed in the decision-making process. I think it is most important to keep in mind that, in part, the cause of our present problem in these negotiations is the failure up to now to take a hard look at U.S. interests in order to determine whether they were well served by the emerging draft treaty. I do not believe this Administration, should it decide to return to the bargaining table, will fail to keep foremost in mind the real national interests. If we negotiate, we will be seeking a genuine and reasonable accommodation, but we will not accept compromises which jeopardize our national interests.

Thank you very much.

STATEMENT OF THEODORE G. KRONMILLER, DEPUTY ASSISTANT SECRETARY OF STATE FOR OCEANS AND INTERNATIONAL ENVIRONMENTAL AND SCIENTIFIC AFFAIRS, BEFORE THE AMERICAN MINING CONGRESS MINING CONVENTION, DENVER, COLO., SEPT. 30, 1981

I am pleased to have this opportunity to meet with the American Mining Congress. I would like to report on progress of the Reagan Administration in dealing with the minerals supply issues raised within the Law of the Sea negotiations. After more than a decade of compromises on access to seabed minerals, this Administration is taking a long, hard look at the results. Although

our review is not yet complete, it is already clear that elements of the Draft Convention relating to seabed mining do not meet our national interests and objectives.

That is hardly a startling revelation. There has been criticism of these elements from important industry groups, including the American Mining Congress, and from members of Congress and the American public. Observers of the negotiations have rightly noted that efforts to achieve a compromise package acceptable to the developing countries have led to provisions relating to seabed mining which embody principles of the "New International Economic Order (NIEO)." These principles reflect an economic and political philosophy which is contrary to our own. As a result, the compromise package does not accommodate essential principles of free market economies, nor provide the basis for investment in mineral resource development. Elements of the text are intended to promote a fundamental redistribution of wealth and power through measures congenial to the centrally-managed economies and through political decisionmaking dominated by the less developed countries. The negotiations have been used as a vehicle to advance the interests of so-called "national liberation groups" of the Third World, an effort reflected in provisions in the Draft Convention.

Faced with this situation and the prospect that the Law of the Sea Conference was preparing to adopt the Draft Convention this year, the Reagan Administration decided to risk international criticism, rather than accept a result that could compromise the national interest, particularly in the area of seabed mining. Active United States participation in the substantive negotiations was suspended and a thorough review was initiated. By the end of next month, the review will be completed and the President will be asked to make a decision as to how we should proceed to protect our national interests.

Although I cannot predict our future course, I can share with you some of the key points of our review on the issue of seabed mining. Deep seabed nodules are a vast potential source of nickel, copper, cobalt, and manganese. The United States currently is dependent to varying degrees on foreign sources of these minerals—virtually 100 percent of our manganese, 73 percent of our nickel, 100 percent of our cobalt, and 14 percent of our copper. For nearly two decades, American miners have searched the seabed for exploitable ore bodies of these minerals and have developed technology for commercial recovery. Full-scale development by American miners, however, depends on assuring access to these resources and providing a stable and secure investment climate. Access would serve our national strategic minerals policy which, as Secretary Watt recently observed, should "protect American jobs and investments, improve our balance of trade, revitalize the nation's economy, and provide for the security of foreign minerals imports."

Nevertheless, there are a number of aspects of the Draft Convention which threaten the security of American access to deep seabed minerals and which make the investment climate for potential miners unattractive.

There is a potential for burdensome international regulation. Private companies seeking to raise the capital necessary to develop and employ seabed mining technology must be certain that, having made an investment, they will be able to mine without unreasonable interference by a politically charged international bureaucracy. The Draft Convention provides the International Seabed Authority with significant discretion and fails to offer sufficient protection for the interests of the minority of minerals dependent, market economies. Operators under the flags of Western industrialized countries could be ordered, for example, to cease work entirely or to maintain levels of commercial production which, under the economic circumstances prevailing at the time, might lead to financial ruin. Worse still, technically and financially qualified applicants for mine sites could be arbitrarily rejected.

The Draft Convention provides for the establishment of a supranational mining entity, which would be provided significant competitive advantages. These could make it impossible for private companies to compete in the absence of government subsidies. The Enterprise would enjoy a right to mine one-half of all the sites prospected by private companies. It would have a right under defined circumstances to the transfer of private technology. It would have guaranteed financing at concessionary rates for its first operation. It would be assured a portion of the limited allowable production under the treaty and would be exempt from anti-monopoly provisions and other similar restrictions. It would enjoy a special holiday from revenue-sharing obligations. As a result

of these and many other advantages taken together, the Enterprise could eventually monopolize production of seabed minerals. This is a matter which we have under close scrutiny.

As I have noted, the Draft Convention provides for mandatory transfer of technology. This applies not only to the Enterprise, but also to developing countries. While the face of the text calls for fair and reasonable commercial terms and conditions, private companies would be compensated, as a practical matter, only at whatever could be obtained under the conditions of a forced sale.

I have referred to limitations on seabed mineral production. The Treaty would limit for twenty years the annual production of seabed minerals. Although this should be calculated to protect the land-based producers of seabed minerals, it is questionable whether they would in fact benefit, and it is possible that consumers would suffer. Restrictions also would be placed on the amount which any single project could produce. The Seabed Authority would have broad discretion to select among competing applicants when the ceiling on seabed production was reached. Such discretion could be used to deny access to qualified American companies. Indeed, the overall policy orientation of the Authority would encourage restrictions on seabed mineral production and limitations on the access of American companies.

Policy-making would be carried out by an organization based on the principle of sovereign equality—that is, one-nation, one-vote. The general policies of the Authority would be dictated by a plenary Assembly operating by a two-thirds majority. As a result, a majority of nations with political and economic objectives at variance with our own could abuse vague and discretionary treaty provisions. Given their preoccupation with protecting the interests of developing country land-based producers, they could also undercut the Western industrialized countries by making decisions which would hinder United States access to seabed minerals. The executive Council, which would make case-by-case decisions whether to approve or disapprove mine site applications, would not provide permanent or guaranteed representation for the United States. Even if the weight of the United States' interests secured our representation on the Council, we would not have influence commensurate with our economic and political interests and our financial contributions. Although the United States representation could block some adverse decisions, we would not have sufficient voting strength to influence important operational decisions or to ensure that necessary affirmative decisions be taken.

It is not clear that American companies with the capacity and qualifications to develop deep seabed minerals would be granted mine sites. For example, there is no remedy provided for a qualified applicant whose proposal is simply not acted upon by the Legal and Technical Commission—the body designated to make recommendations to the Council. Moreover, the voting system for the Council's approval or disapproval of contract awards provides no assurance that the United States could reverse an improper recommendation by the Commission.

A Review Conference would have the power to impose treaty amendments on the United States over our objection. After the first fifteen years of the treaty regime, a conference would be convened to determine whether the treaty's policies had been fulfilled. In that connection, the text indicates that the Review Conference could emphasize not the degree to which the treaty encouraged seabed mineral production, but the extent to which it provided protection for land-based producers of seabed minerals and promoted mining by the Enterprise and developing countries. If two-thirds of the States Parties to the treaty decided to change the system of exploitation, they could do so after five years of negotiation and after ratification by two-thirds. It would be unrealistic to believe that the so-called parallel system would be continued after the Review Conference when the developing countries would have the freedom to establish a monopoly Enterprise. The regime could be fundamentally altered in a manner unacceptable to the United States.

The Draft Convention imposes financial terms and conditions on seabed miners which would significantly increase the costs of seabed mining. This could deter or reduce ocean mining and increase the costs of important raw materials. The treaty also would impose very large financial burdens on States, without giving them political influence in the Authority or the Enterprise commensurate with their financial stakes.

With these and other problems of the text in mind, the Reagan Administration considered certain economic and political realities. The United States de-

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pends on its private companies for access to resources. The Draft Convention could create such an unfavorable climate for private investment that American seabed miners would be unlikely to operate under it. Indeed, if seabed mining were to take place under the treaty, it would be more realistic to assume that the privileges granted to the Enterprise and developing countries would mean that, in order to compete, private companies would have to operate in joint ventures and the U.S. would thus remain dependent on foreign sources of supply for certain strategic minerals. A treaty which manifested such serious obstacles to access to seabed minerals would not likely obtain the advice and consent of the Senate. This assessment has weighed heavily in our policy review.

Another factor which the President will have before him when he makes his decision will be the interests and views of other major industrialized countries, the developing countries, and other participants in the Conference. In conducting the review of Law of the Sea policy, the Administration has been mindful that most delegations to the Conference believed earlier this year that the conclusion of the long negotiation was at hand. During the recently concluded Geneva session of the Conference, the United States delegation sought to engage in a dialogue with Conference leaders concerning the problems with the text. In so doing, the delegation sought to assess the opportunities that might be available to achieve improvements.

The formal work program of the Geneva Session had called for concluding negotiations on a few outstanding issues which were pending after the previous session—the preparatory commission, preparatory investment protection, participation by international organizations and liberation movements, and delimitation. Outside this formal work program, however, several opportunities were arranged for exposition of the issues which concern the United States. In several public meetings and in numerous private exchanges, Ambassador Malone sought to explain these problems and to ascertain whether it is realistic to expect improvements.

In response, the Chairman of the Group of 77 pointed to the advanced stage of the negotiations and emphasized that the United States had been an active participant in engineering what he described as a compromise package. In reiterating the developing country position on the Draft Convention, he invoked the principles of the NIEO and pointed out that the developing countries felt they had made many compromises and did not believe they should be forced to make more.

A number of delegations expressed sympathy for the United States position. Our allies, in particular, emphasized the importance they attach to United States participation in a Law of the Sea treaty.

Most delegations delivered a dual message. First, they acknowledged that there remain problems with the Draft Convention and they supported further efforts to explore solutions to the concerns raised by the United States. Second, they cautioned that negotiations had advanced to such a stage that any future proposals for changes in the Draft Convention should be consistent with existing fundamental elements.

Quite apart from the attention devoted to the issues raised by the United States, the Conference continued its work and made two procedural decisions that could influence any future resumption of participation in the negotiations by the United States. First, the Conference decided to issue a new text of the Draft Convention. The text will incorporate the recommendations of the Drafting Committee. It will no longer be expressly designated an "informal text." This new text may only be changed, however, in accordance with the rule of consensus, until the Conference decides to proceed to voting.

Second, the Conference decided on a work program for the next session. The session will be for eight weeks beginning March 8, 1982. The first three weeks of the session will be reserved for consultations and negotiations. The schedule provides for voting on formal amendments to the Draft Convention sometime after April 6, 1982. A number of delegations expressed the view that it was important that the schedule be maintained. Nevertheless, they also indicated that, if productive work were underway and more time was needed, they would not be unduly rigid about adhering to the schedule.

As I have noted the Administration will soon complete its assessment of the way in which United States interests in access to seabed mineral resource, in military and commercial navigation, in fishery resources, in marine scientific research, and in the marine environment may best be served. The Reagan Admin-

istration will rigorously evaluate the importance to the United States economy and security of assured access to strategic materials as well as other aspects of the Law of the Sea. It will also be mindful of the important questions of principle and foreign policy which are raised by this negotiation.

Whatever the outcome of the review, I can assure you that our Law of the Sea policy will reflect our real national interests, including access to mineral resources. It will also reflect this Administration's determination to establish a new foundation for the United States participation in international negotiations that affect American economic and political life and our national defense.

OCTOBER 15, 1981.

Hon. T. VINCENT LEARSON,
North Monursing Island,
Rye, N.Y.

DEAR MR. LEARSON: As I indicated following your testimony on September 30 before the Foreign Relations Committee, I would like to solicit some additional comments from you on the issue of technology transfer in the Law of the Sea negotiations. In that connection, I am enclosing several items on which your comments would be most welcome:

(1) A letter from Richard Legatski of the National Ocean Industries Association commenting on your testimony;

(2) A statement by George W. Whitney, President of the American Patent Law Association given before the Committee on March 5, 1981;[1]

(3) A position paper of August 5, 1981 from the International Chamber of Commerce.

Needless to say, there is no need to respond point-by-point to each of these statements, but it would no doubt be very helpful to have your response and comments on the principal arguments made. We would like to include these in the record to supplement your own testimony.

Thank you for your testimony and for your continued willingness to address these critical issues.

With best regards,

Sincerely,

FREDERICK S. TIPSON,
Chief Counsel.

NATIONAL OCEAN INDUSTRIES ASSOCIATION,
Washington, D.C., October 6, 1981.

Hon. LARRY PRESSLER,
Chairman, Subcommittee on Arms Control, Oceans, International Operations and Environment, Committee on Foreign Relations, Dirksen Senate Office Building, U.S. Senate, Washington, D.C.

DEAR SENATOR PRESSLER: On September 30, 1981 your subcommittee conducted a hearing on the draft Law of the Sea Treaty. During the hearing, one witness, Ambassador T. Vincent Learson, made certain remarks which this Association considers to be highly misleading in regard to the acceptability to American industry of the draft treaty's articles on transfer of technology.

Ambassador Learson's testimony was to the effect that, since transfers of technology under the treaty regime would be on "fair and reasonable commercial terms and conditions," he did not feel that American companies would object to the draft treaty's transfer structure.

The National Ocean Industries Association currently represents nearly 500 American companies, many of which would be involved in supplying equipment and skills necessary to the ability of deep ocean mining consortia to conduct mining operations. The Association's members are unanimous in their strong disagreement with Ambassador Learson, and feel that the technology transfer articles of the draft treaty are not commercially workable for a variety of reasons, as follows:

(1) that in some instances transfer would be mandatory, thus making it impossible to conduct a fair arm's-length negotiation;

(2) that employees of the "Enterprise" who misuse confidential materials after a transfer are subject to only token penalties, so that the risk of

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[1] This statement is reprinted in the committee print for Mar. 5, 1981.

commercial or military espionage is quite serious (military espionage may be a problem since some of the technologies involved in seabed mining are quite advanced, and currently are subject to export restraints under CoCom rules and U.S. domestic export control law) ;

(3) that there is no equivalent to "patent" rights on the high seas, since patent law is not extraterritorial in effect ;

(4) that, should a loss of proprietary data occur, the text provides no compensation remedy whatever for the owner of the affected technology ;

(5) that "technology" is defined in a grossly overbroad way, to include the very essence of the engineering skill which permits holders of an advanced technology to complete ;

(6) that any technology not made available to the "Enterprise" must also be withheld from the resource company which is seeking the right to mine in the first instance, so that the resource company may not be able to conduct operations, for want to needed equipment ;

(7) that the burdens imposed on technology suppliers would create a disincentive to innovation, thus damaging the economies of all nations at least indirectly ; and

(8) that a tremendously damaging precedent would be set by entry into force of a transfer regime of this type, with the result that many other international commercial agreements might be affected.

Having enumerated the foregoing set of specific shortcomings in the draft treaty, we cannot understand how Ambassador Learson arrived at his facile conclusion that the draft text is suitable in this respect. We suspect that his views would change markedly if he consulted with patent lawyers who have evaluated the text and soundly condemned it. I enclose for your consideration a copy of testimony by George Whitney, President of the American Patent Law Association, and a copy of statement on technology transfer under the Law of the Sea text, setting out the views of the technology transfer task force of the U.S. Chamber of Commerce.

I respectfully request that this letter and its enclosures be made a part of the record of the September 30, 1981 hearing, to balance the record and hopefully to correct its presentation of the topic of technology transfer under the draft treaty on Law of the Sea. Thank you for your consideration of our views.

Sincerely yours,

RICHARD A. LEGATSKI.

Enclosures.

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA,
Washington, D.C., October 26, 1981.

HON. LARRY PRESSLER,
Chairman, Subcommittee on Arms Control, Oceans, International Operations and Environment, Committee on Foreign Relations, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN : The U.S. Chamber of Commerce disagrees with Ambassador T. Vincent Learson's testimony on the draft Law of the Sea Treaty which was delivered before your subcommittee on September 30, 1981. We feel that it did not reflect the business community's views on the draft treaty's technology transfer articles. The Ambassador's comments were not representative of the feeling among U.S. Chamber member firms whose operations would be affected by the technology transfer provisions of the treaty.

The Chamber's membership consists of over 187,000 firms and individuals, over 2,600 local and state chambers of commerce and some 1,200 trade and professional associations. The particular issue of the Law of the Sea draft treaty and its various ramifications for business has been followed by several Chamber committees and task forces.

In his statement, Ambassador Learson said that mandatory technology transfers under the treaty regime would be on "fair and reasonable commercial terms and conditions." This carries a presumption that U.S. companies would not object to the proposed U.N. structure for carrying out these transfers in deep seabed mining.

The U.S. Chamber, in fact, has serious concerns about provisions in three major areas of the seabed mining section of the draft treaty. These are : (a) the extent of technology transfer powers vested in the U.N. seabed mining institutions (the "Enterprise," and the "Authority") ; (b) the broad language used in the treaty provisions to define "technology" and (c) the lack of protection for the integrity

of private property. We hope the following summary of our objections will be useful to you as an indication of business opinion on this difficult issue.

First, Law of the Sea Treaty negotiators have given the United Nations the right to demand that companies entering into seabed mining contracts transfer their technology to the U.N. for subsequent dispersal to Third World governments. Whereas some sort of concessions may be called for in order to meet the less developed countries' competitive needs, similar in concept to the Generalized System of Preferences, the U.S. Chamber objects to the exploitative power vested in the U.N. Authority by the draft treaty. As it stands, this power amounts to giveaway authority. There are absolutely no assurances that the "Enterprise" will be constrained by the laws of the marketplace. "Commercial terms and conditions" called for in the treaty are too vague and are nonbinding on either the Enterprise or the Authority.

Second, the technology transfer provisions of the draft treaty define "technology" in overly broad terms. The scope of the treaty language implies the inclusion of company secrets and proprietary information. The technology transfer provisions mandate the transfer of even essential engineering skills and processing technologies which are crucial to commercial competitiveness. Such a burden along with the threat of reprisals for noncompliance with requests by the "Enterprise" for transfers of technology, would create a strong disincentive to any mining of sea resources at all, as well as discourage subsequent technological innovation by private companies.

Third, deep sea mining technology is extremely security-sensitive. The treaty provides absolutely no conventional protection for private property or for confidentiality when mining technology is transferred. Employees of the U.N. "Enterprise" who misuse confidential information are subject only to token penalties. This increases the risk of commercial espionage and theft. In addition, there are no "patent" rights on the high seas, and none has been developed for inclusion in the treaty.

We regard all these as serious drawbacks in the draft treaty. We cannot agree that technology privately developed at great cost and risk is the "common heritage of mankind," as the seas themselves are. The laws of the marketplace are the common heritage of free societies. While we recognize the need to help countries that are just beginning the development process, we feel they will be able to compete in time, and that they have many resources with which to create the dynamic economic conditions in which they will eventually thrive. International trade and aid systems are being restructured to facilitate these developments.

The Chamber's Technology Transfer Task Force has written a Position Paper on the Law of the Sea Treaty, which is enclosed for your information. It goes into more detail about the Chamber's specific problems with the draft treaty. We will be happy to answer any questions you may have on the subject.

Cordially,

HILTON DAVIS.

Enclosure.

TECHNOLOGY TRANSFER TASK FORCE POSITION PAPER ON LAW OF THE SEA TREATY, AUGUST 5, 1981

The United States Chamber of Commerce strongly opposes the provisions of the August 27, 1980 Draft Convention on the Law of the Sea which require mandatory transfer of privately owned technology in order to gain access to seabed resources.[1]

Privately owned technology in this country is not the "common heritage of mankind." Privately owned technology has been successfully developed in the United States to the present sophisticated level in large part because of the American economic system which encourages and protects the development of technology. Should the United States go forward with participation in the treaty process, ownership rights in privately developed technology must be fully protected. Lack of full protection is a major obstacle to the development and utiliza-

[1] On April 28, 1981 Deputy Secretary of State James L. Malone reported to the House Merchant Marine & Fisheries Committee, Subcommittee on Oceanography, that the Reagan Administration was concerned, *inter alia*, with the technology transfer provisions of the Draft Convention. The Chamber applauds this concern for the reasons set forth in this Position Paper.

tion of important mineral and hydrocarbon recovery technology—to the detriment of technology companies, resource companies, and both developed and developing nations.

Mandatory transfer of technology is inherently and fundamentally inconsistent with private ownership of technology and the continued strength of the economic environment which spawned that technology. Technology transfer must be a voluntary act, profitable to both the transferor and to the transferee. (See, "Technology Transfer and the Developing Countries", Report of the Task Force on Technology Transfer, Chamber of Commerce of the United States, April 1977.)

Consistent with this principle, the Chamber strongly opposes the extraordinarily broad mandatory technology licensing provisions of the convention at Annex 3, Article 5, Section 3, which provides that in any contract awarded, there shall be included the following undertakings by the operator: "To make available to the Enterprise [a potential competitor], if and when the Authority shall so request and on fair and reasonable commercial terms and conditions, the technology which is to be used by him . . . which he is legally entitled to transfer."

Section 3(a) does provide that this transfer of technology "may be invoked only if the Enterprise finds that it is unable to obtain the same or equally efficient and useful technology on the open market and on fair and reasonable commercial terms and conditions." However, it is only by operation of an "open market" that a "fair and reasonable" value can be assigned to that technology. No bureaucratic mechanism can suffice—especially not an international agency dominated by socialist and third world interests.[2]

One of our negotiators has written that "both contractors and suppliers (of technology) are likely to be willing sellers. A customer with ready money in a limited market is a jewel to be fought for, not avoided. A sale by a contractor would recoup part of the high investment in research and development."[3] In actual practice, technology is nearly always developed to give the developer an advantage in competing with his competitor, not to make it available to competitors. The private developers of this technology will lose the important option of not licensing their technology to competitors by these provisions in the Draft Convention.

Accordingly, any concept that forces the giving up of trade secrets and the like is unacceptable to private enterprise.

The negative effect of Annex 3 is exacerbated both by the broad scope of the definition of "technology" to be mandatorily transferred, and by the range of potential recipients. Article 5, Section 8, defines "Technology" as meaning: ". . . the specialized equipment and technological know-how, including the manuals, designs, operating instructions, training and technical advice and assistance, necessary to assemble, maintain and operate a viable system and the legal right to use these items for that purpose on a non-exclusive basis." This language includes within its scope information which is normally treated as proprietary and highly confidential. Furthermore, the Draft Convention would seek to expropriate broadly defined technology not even wholly owned by the user but also that which is only licensed to the user (Article 5, Section 3(b)). Technology used in "processing" of minerals taken from the sea (Article 5, Section 5) would also be subject to the convention. It should be noted that if the owner of the technology to be used by the user will not make it available to the Enterprise, the user (licensee) is not permitted to use the technology in performing the contract issued by the International Sea-bed Authority.

The potential recipients of the technology include the Enterprise, a possible direct competitive interest. In addition, Section 3(e) permits a developing State or group of developing States which have applied for a contract to gain access to

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[2] As an indication of the domination of the International Seabed Authority by developing countries and others, Article 162(1) provides that a Council is the executive organ of the Authority, and has a wide number of powers. The Council consists of 36 members (each member is from a different country). Article 161 sets forth provisions on how the 36-member Council is to be selected, and these provisions result in the Council including at least three states from the Eastern (Socialist) countries, and at least eight from developing countries, not including additional members from each of Africa, Asia and Latin America, which will probably be three more developing countries. There is no requirement that either the United States or Canada or any other nation in North America must be included, and North America is not even mentioned as one of the geographical regions of the earth.

[3] Brewer, Jr., W. C., "Transfer of Mining Technology to the International Enterprise," Ocean Policy Study 2:4, Center for Ocean Law and Policy of the University of Virginia, January 1980.

the technology, provided the proposed activities by the applicant would not involve transfer of technology to a Third State or nationals of a third State. This requirement would apply only where the technology has not been requested or transferred by the operator to the Enterprise, which implies that the Enterprise may be free to disclose to developing States any technology which has been transferred to it. The Convention as drafted would ensure that a developing State has access to privately owned technology used by the developed States.

As stated by George W. Whitney in his capacity as President of the American Patent Law Association before the Committee on Foreign Relations, United States Senate on March 5, 1981: "High technology products, machines, and processes are assets acquired at high costs and considerable risk. Their development requires long term expenditures of money and manpower. To efficiently mine the sea, not only will existing technology and experience have to be greatly advanced, but whole new technologies will have to be developed. We cannot conceive that any American Industry will undertake this major endeavor, knowing that what it invents and brings into being will be immediately transferred to its competitors. We as their advisors could not in good faith recommend such action."

The Chamber concurs. Only the most commercially naive could expect a potential operator to subject valuable intellectual property to such a risk. It simply will not happen. As a consequence, the essential object of Article 150—development and utilization of seabed resources for the benefit of all mankind—will be fatally frustrated.

The Chamber is also concerned with the commitment under Article 144, Section 2(a) of States to initiate and promote "Programmes for the transfer of technology to the Enterprise and to developing States . . . including *inter alia*, facilitating the access of the Enterprise and of developing States to the relevant technology, under fair and reasonable terms and conditions." Article 270 provides, in essence, for international cooperation for the development and transfer of marine technology. This would be accomplished through existing, expanded or new programs to facilitate marine scientific research and the transfer of marine technology, particularly in new fields and through appropriate international funding for ocean research and development.

Article 271 recommends establishing a code of conduct by providing that "States . . . shall promote the establishment of generally accepted guidelines, criteria and standards for the transfer of marine technology . . . taking into account, in particular, the interests and needs of developing States."

Article 273 goes on to say that "States shall co-operate actively with competent international organizations and the Authority, to encourage and facilitate the transfer to developing States, their nationals and the Enterprises of skills and technology. . . ."

Article 274 goes further and states, "Subject to all legitimate interests including, *inter alia*, the rights and duties of holders, suppliers, and recipients of technology, the Authority shall ensure that . . . (b) the technical documentation on the relevant equipment, machinery, devices and processes be made available to all States, in particular developing States which may need and request technical assistance in this field. . . ."

To help further increase the likelihood of technology transfer, Article 274(d) also instructs the Authority to ensure that "States which may need and request technical assistance in the field, in particular developing States, are assisted in the acquisition of necessary equipment, processes, plant and other technical know-how through any financial arrangements provided for in this Convention."

These and other similar provisions allow for financial reserves of the United States to be used to ensure that privately owned technology is made available to others—including those who may be in direct competition with us. At a time when domestic social programs feel the effects of the fiscal realities of the 1980's, it is difficult to justify such philanthropic endeavors toward those who support systems which fundamentally deny the concept of private enterprise.

We recognize that there are a number of philosophical and policy issues of broad scope which have to be reconciled in the course of reaching multinational agreements. However, we have serious reservations when such compromises relate to such basic concepts as ownership of private property and the free enterprise system. All mandatory licensing provisions and codes of conduct which suggest such provisions must be opposed. The Chamber of Commerce simply cannot support a convention which is based on principles hostile to the

very environment which was and will continue to be responsible for fostering the development of valuable privately owned technology.

ARMONK, N.Y., *November 11, 1981.*

F. S. TIPSON, Esq.,
Chief Counsel, Committee on Foreign Relations,
U.S. Senate, Washington, D.C.

DEAR MR. TIPSON: Thank you for the materials you sent with your letter of October 15.

The three statements express the common view that we should not accept a treaty with mandatory technology transfer requirements. I understand these concerns, but agree only that while provisions of this sort are contrary to a purist of the free enterprise system, they are frequently a necessary part of the functioning of the free enterprise system. But I don't believe the concepts currently being considered are so repugnant that we should refuse to go forward with them at all, in view of the importance of the treaty and the need for some compromise.

My position is predicated on the assumption that the technology now being considered is limited to that relevant to recovery of minerals and will not include processing technology. Furthermore, the recovery technology is at risk market. I believe this limited risk is worth taking to achieve a treaty that will only to the extent the Enterprise cannot obtain it or its equivalent on the open create a peaceful and secure regime within which sensible exploitation and protection of the sea can be assured.

The number of sites that will be operational over the next twenty to thirty years will be so few that the cost of the technology must be spread over as many sites as possible. This reaffirms the necessity of selling it to the Enterprise.

I do not advocate acceptance of the current text. There certainly are problems with the provisions, as I stated in my testimony. My view is, though, that we must be specific in our approach to these and offer practical solutions, and we must be prepared to make acceptable compromises to achieve a text that all parties can agree to.

Thank you for the opportunity to clarify my views.

Sincerely,

T. V. LEARSON.

The Economics of the Common Heritage of Mankind

James L. Johnston
Standard Oil Company (Indiana)

The mineral resources of the oceans beyond the limits of national jurisdiction have been declared by the U.N. General Assembly in December, 1970, to be the common heritage of mankind. This has been interpreted by some international negotiators as being equivalent to common ownership and sufficient to justify elaborate regulation of ocean miners overlaid with extra revenue sharing levies, technology transfer, and production controls, all intended to stimulate the economic growth of developing countries. This hypothesis is examined from an economic perspective and found to be seriously flawed. The policies are more likely to be perverse in the sense that industrially developed land-based mineral producers are those protected, with mineral consumers, especially those in developing countries being most at jeopardy. Domestically, the balance of trade will worsen, consumers will lose, and the tax revenues will be less if the U.S. ocean mining industry is not permitted to develop. Quantitive estimates of the gains and losses are provided.

INTRODUCTION

The deep seabed negotiations at the Third U.N. Conference on the Law of the Sea (UNCLOS) are widely viewed as a contest between ocean miners in industrialized countries on one hand and the impoverished masses in developing countries on the other. The underlying presumption seems to be that the third world is the principal supplier of mineral raw materials, while the industrialized countries are the everincreasing consumers. It is a kind of zero-sum game where the industrialized country gains come at the expense of the developing countries.

A contrasting view which prevails among economists and many others is that an activity which increases mineral supplies leads to a general gain to society. Among the latter group, innovation is considered the key ingredient in real economic growth because it leads to a greater conservation of resources, to greater level of output, or both. Thus, improvement in the human condition occurs in part from innovative effort to make better use of the world's resources (4, 5).

Setting about to test which view is a more appropriate description of how the world operates is a difficult task. Since one outcome essentially precludes the other, a fully conclusive test is impossible. Short of that, however, it is possible to perform, in this case, a projection of the economic trends with and without minerals recovered from the ocean, and estimate the magnitudes of the gains and losses, and thus identify the gainers and losers.

ASSUMPTIONS

One might approach the task of projection in several ways. Perhaps one of the most elaborate is to construct a set of market relationships for each of the four principal metals (nickel, copper, cobalt, and manganese) found in ocean nodules, including explicit functions for the factors of production and the major substitute metals. That is an ambitious project, beyond the modest objectives of the present exercise.

More appropriate is an approach based upon Bureau of Mines (2, 8, 9, 10) data and projections for the four metals, supply and demand elasticities as reported in Adams (1), and projections of consumption from Malenbaum (6). This is the approach adopted for this exercise. A summary of the assumptions is contained in Table 1.

DECEMBER 1979 - JANUARY 1980 v. 13 n. 6

TABLE 1
NUMERICAL ASSUMPTIONS
(Quantities are in 10^3 Metric Tons)

For 1978...	Ni	Cu	Co	Mn
World mine production	805*	8,116*	34	10,602*
Projected annual rate of growth	3.6%	4%	4½%**	2½%
Developing Country production	102	3,281	16	2,840
Projected annual rate of growth	0%	2½%	0%	0%
U.S. mine production	11	1,347	0	0
Projected annual rate of growth	3.2%	3%	0%	0%
U.S. consumption	166	2,805*	6*	1,404*
Projected annual rate of growth	3.2%	1.7%	3.3%	1.6%
Own price elasticity	−1.44	−.82	−.50	−.75
Supply elasticity	1.22	1.67	1.67	1.00
World price, 1978 $/tonne	5,511½	1,466	25,419	138
Developing Country consumption	16	882	2	2,616
Annual growth rate	4½%	4.3%	5.6%	4.2%
1990 ocean mining	89	75	12	794
World annual growth	3.6%	4%	4½%	2½%
U.S. annual growth	3.2%	3%	2½%	1%

*Least squares adjustment
**Not including Co recovery from the ocean

The estimates for the output from ocean mining are based, in altered form, on Tinsley (11). Besides using a less ambitious schedule, the projections for the four-metal output from ocean nodules presume that over time countries other than the United States will account for an increasing share. Within the time horizon of this examination, the non-U.S. output from the ocean is presumed to be totally accounted for by miners from countries other than those who are members of the Group of 77 developing countries.

An implied assumption is that ocean mining is part of the natural expansion of supplies of metals. Thus, the exponentially smoothed shifts in demand are presumed to generate increases the supplies, including those from the ocean along a stable supply schedule. The one exception is the cobalt market. Since cobalt recovered from the ocean will be a sizable fraction of the total market, it was felt more appropriate to extrapolate land-based production and consider the ocean supply to be supplementary.

THE WORLD MODEL

The supply-demand diagram in Figure 1 shows the basic components of concern in the world market for each of four metals. The total supply curve comprises three components. One is the supply originating from developing countries. The second is the output from land-based sources in industrialized countries. The third is the metal quantities recovered from the ocean.

The intersection of demand and total supply determines the market price and world output per year from all sources. When there is no mineral recovery from the ocean, the reduced supply results in an increase in the prevailing price. There are also corresponding increases in the output from developing countries and land-based producers in industrialized countries. Combined, these changes mean that the earnings of land-based producers (shaded areas a and b in Figure 1) in and out of the third world will be greater than they would have been with ocean mining.

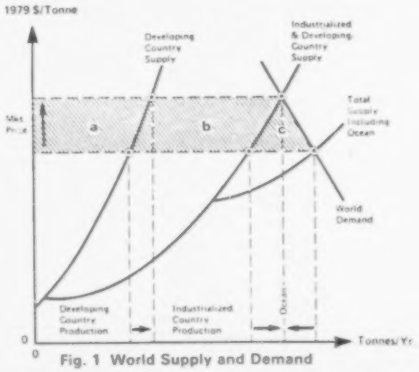

Fig. 1 World Supply and Demand

The gain comes at the expense of the world consumers, which increasingly are those in developing countries. Actually, the loss to consumers exceeds the gain to land-based producers because there is a deadweight loss by consumers (shaded area c) not received by the land-based producers.

THE U.S. MODEL

A similar model for the United States is shown in Figure 2. Of particular interest in the domestic market are the changes in (a) imports, (b) U.S. consumer surplus, and (c) revenues which accrue to the U.S. Treasury from the 46 per cent corporate income tax. The change in balance of payments is depicted in Figure 2 as the difference between the total revenue received by foreign producers when there is no ocean mining and the import bill when there is domestic ocean mining (shaded area d in Figure 2). The change in U.S. consumer surplus is reduction of the area under the domestic demand curve associated with the higher prices caused by the elimination of ocean mining.

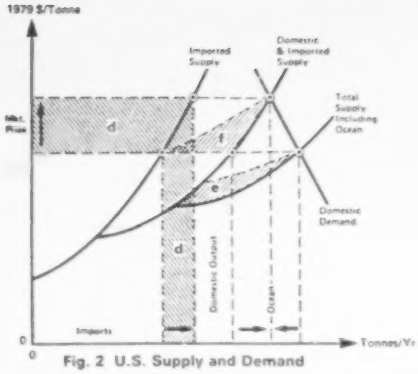

Fig. 2 U.S. Supply and Demand

The tax revenues which will be foregone by the U.S. Treasury is 46 per cent of the net revenue which would have been earned by the ocean mining industry (shaded area e), less 46 per cent of the increased earnings from domestic land-based production, if any (shaded area f).

RESULTS OF THE ANALYSIS

The effect of the current and previous negotiating texts which have emanated from the UNCLOS is to make mineral recovery from the oceans uneconomic. Thus, examination of the prevailing market conditions in the world and in the U.S. indicates the principal gains and losses which are to be expected when mineral recovery from the oceans is foregone. These estimates result from a parametric analysis and are indicative of the direction and rough magnitude of the effects of eliminating ocean mining. They are not precise measures, nor are they particularly good statements of the profitability of individual mining ventures including those from the ocean. However, the estimates should be indicative of the principal economic interests involved in the UNCLOS negotiations and how their fortunes change.

The Results from the World Model

One effect of precluding ocean mining as a potential source of mineral supplies is to cause an increase in the net revenue accruing to land-based producers. The table below shows the gains to mineral producers in developing countries.

ANNUAL GAINS TO
DEVELOPING COUNTRY PRODUCERS
(Millions of 1979 Dollars)

	1990	2000	2010	2020	2030
Nickel	29½	40	53	71	96
Copper	14	21	33	50	78
Cobalt	54	66	81	99	121
Manganese	14	18	23	29	37
Total	112	145	190	249	332

By contrast, the gains to land-based producers in industrialized countries will be greater by sizable amounts.

ANNUAL GAINS TO INDUSTRIALIZED
COUNTRY PRODUCERS
(Millions of 1979 Dollars)

	1990	2000	2010	2020	2030
Nickel	300	591	1134	2237	4315
Copper	41	77	141	259	471
Cobalt	112	250	516	1027	2020
Manganese	54	94	160	271	453
Total	507	1012	1951	3794	7259

Even in the case of cobalt which has until recent times been mainly an export of developing countries, the future gains to industrialized countries are expected to be greater. The reason is that cobalt output in industrialized countries has been increasing at a statistically significant rate of 18.6 per cent per year (between 1973 and 1978) while the cobalt output from developing countries has been decreasing.

When the losses to *consumers* in developing countries are estimated (see below) it can be seen that after the year 2010, the magnitudes are larger than the gains which accrue to mineral producers in developing countries, and smaller by a significant amount than the gains to be realized by industrialized-country producers. Of course, developing countries which are large producers and only modest consumers will gain on an individual basis. But on an aggregate basis developing countries lose by restricting mineral recovery from the ocean. Thus, it would appear that the Group of 77 developing country representatives act principally in support of land-based producer interests (mainly in industrialized countries), rather than the interests of their own domestic consumers.

ANNUAL CONSUMERS LOSSES
IN DEVELOPING COUNTRIES
(Millions of 1979 Dollars)

	1990	2000	2010	2020	2030
Nickel	7½	16	32	68	142
Copper	6	11	20	37	68
Cobalt	12	26	50	111	231
Manganese	21	41	79	152	293
Total	47	94	181	368	734

It should be clear that producers in developing countries will share, along with ocean mining, in the gains from the natural expansion of mineral demand, as indicated below.

These gains are larger in each case than those resulting from restrictions on ocean mining. But the implications may not stop there. To the extent that valuable mineral productions is more concentrated without the ocean supply, developing countries become more vulnerable to external threats. They may also be more susceptible to

internal revolution as the large export earning industry becomes the focal point for insurgent pressure on the established regime.

ANNUAL DEVELOPING-COUNTRY PRODUCER GAINS WITH OCEAN MINING
(Millions of 1979 Dollars)

	1990	2000	2010	2020	2030
Nickel	3	4	5	7	9
Copper	152	234	358	550	845
Cobalt	14	17	21	26	31
Manganese	11	14	18	23	30
Total	180	269	402	606	915

Restrictions on one source of supply may also signal consumers that they should invest in developing substitutes for the four metals. Given that mineral raw materials are characteristically inputs at an early stage of production, there are substitute possibilities at each subsequent stage, including the final product. Thus, the long-run prospects for healthy growing markets for the four metals may be dimmed if supplies from the oceans are precluded by political action.

The Results from the Domestic Model

The U.S. markets for three of the four metals are dominated by imports. This in turn means that elimination of the marine portion of the metals industry will worsen our balance of payments. The table below indicates the magnitude.

ANNUAL CHANGE IN U.S. BALANCE OF TRADE WITH NO OCEAN MINING
(Millions of 1979 Dollars)

	1990	2000	2010	2020	2030
Nickel	−888	−1,643	−3,015	−5,567	−10,208
Copper	−133	−213	−342	−551	−890
Cobalt	−350	−547	−914	−1,366	−2,121
Manganese	−126	−178	−252	−357	−505
Total	−1,297	−2,581	−4,523	−7,841	−13,724

The adverse balance is almost $1½ billion in 1990 and that amount comes close to doubling each subsequent decade.

More important, however, are the losses that U.S. consumers will sustain if the domestic market is not augmented with ocean source minerals. The following table indicates that U.S. consumer losses grow ten-fold from 1990 and 2030, exceeding a billion dollars in 2030.

ANNUAL U.S. CONSUMER LOSSES WITH NO OCEAN MINING
(Millions of 1979 Dollars)

	1990	2000	2010	2020	2030
Nickel	68	125	229	421	775
Copper	15	21	30	42	60
Cobalt	27	45	78	134	225
Manganese	8	12	18	27	41
Total	118	203	355	624	1101

With that magnitude of loss to U.S. consumers, it is clear that ocean mining is strongly in the U.S. interest. But if that is not enough of a rationale along with the balance of payments argument to encourage U.S. negotiators to be diligent in their efforts, perhaps an estimate of the drain on U.S. Treasury tax revenues will help. It is projected that the reduction in U.S. tax revenues from eliminating ocean mining (offset by the increase in tax revenues from domestic land-based production) begins at $12 million in 1990 and increases by an order of magnitude by 2030. To this can be added the reduction in personal income tax revenues resulting from the U.S. consumer losses (assuming a 21 per cent average tax rate). It would appear that the U.S. Treasury has as much to lose with no U.S. ocean mining as the land-based producers in developing countries have to gain. It suggests that tax revenues which accrue from U.S. consumers and ocean miners could be transferred to land-based producers in developing countries to compensate them fully for any notional gain they may have foregone by their acceptance of ocean mining.

ANNUAL U.S. CORPORATE TAX REVENUE LOSSES WITH NO OCEAN MINING
(Millions of 1979 Dollars)

	1990	2000	2010	2020	2030
Nickel	11	20	37	68	126
Copper	−3	−4	−7	−11	−18
Cobalt	3	5	8	13	20
Manganese	1	2	3	4	6
Total	12	23	41	74	134

TOTAL ANNUAL TAX REVENUE LOSSES WITH NO OCEAN MINING
(Millions of 1979 Dollars)

	1990	2000	2010	2020	2030
Nickel	25	46	85	156	289
Copper	0	0	−1	−2	−5
Cobalt	9	14	24	41	67
Manganese	3	5	7	10	15
Total	37	65	115	203	366

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APPENDIX A

LEGEND FOR DATA ROWS APPEARING IN APPENDICES B, C, D, AND E

A. 10^3 tonnes/yr. of world production including ocean supply
B. 1979 $/tonne price with ocean supply
C. 10^3 tonnes/yr. ocean production worldwide
D. 1979 $/tonne price without ocean supply
E. 10^3 tonnes/yr. of world production without ocean supply
F. 1979 10^6 gain in producers surplus worldwide
G. 1979 10^6 gain in profits for developing country producers
H. 1979 10^6 gain in profits for industrialized country producers
I. 1979 10^6 loss for consumers worldwide
J. 1979 10^6 loss for consumers in developing countries
K. 10^3 tonnes/yr. of consumption in developing countries
L. 1979 10^6 deadweight loss worldwide
M. 10^3 tonnes/yr. output from developing countries with ocean supply
N. 10^3 tonnes/yr. output from developing countries without ocean supply
O. 10^3 tonnes/yr. consumption in the United States
P. 10^3 tonnes/yr. U.S. production from the ocean
Q. 10^3 tonnes/yr. U.S. consumption without ocean supply
R. 1979 10^6 loss in U.S. consumer surplus
S. 10^3 tonnes/yr. of imports into the United States with ocean supply
T. 10^3 tonnes/yr. of U.S. imports without ocean supply
U. 1979 10^6 change in U.S. balance of trade
V. 1979 10^6 change in U.S. tax revenue from ocean miners
W. 10^3 tonnes/yr. of U.S. land-based production
X. 1979 10^6 change in U.S. tax revenue from U.S. land-based producers

APPENDIX B

NICKEL

Ni	1990	1995	2000	2005	2010	2015	2020	2025	2030
A	1,231	1,469	1,753	2,092	2,497	2,980	3,557	4,245	5,066
B	10,452	12,108	14,027	16,250	18,829	21,814	25,276	29,283	33,926
C	89	106	127	151	181	215	257	307	366
D	10,736	12,436	14,409	16,691	19,342	22,406	25,963	30,079	34,847
E	1,183	1,412	1,684	2,010	2,399	2,864	3,418	4,079	4,868
F	330	457	631	873	1,187	1,668	2,308	3,191	4,411
G	29½	34	40	46	53	61	71	83	96
H	300	423	591	827	1,134	1,607	2,237	3,108	4,315
I	343	474	655	906	1,236	1,729	2,394	3,313	4,577
J	7½	11	16	23	32	47	68	98	142
K	27	34	42	52	65	81	101	126	157
L	13	17	24	33	49	61	86	122	166
M	102	102	102	102	102	102	102	102	102
N	105	105	105	105	105	105	105	105	105
O	243	284	333	390	456	534	625	732	857
P	89	104	122	143	167	196	229	268	314
Q	233	273	320	375	438	513	601	703	823
R	68	92	125	169	229	311	421	572	775
S	139	162	190	222	260	304	356	418	489
T	218	255	299	350	409	479	561	657	769
U	−888	−1,210	−1,643	−2,234	−3,015	−4,101	−5,567	−7,522	−10,208
V	−13	−18	−24	−33	−44	−60	−81	−110	−149
W	15	18	21	25	29	34	40	46	54
X	+2	+3	+4	+5	+7	+9	+13	+17	+23

APPENDIX C
COPPER

Cu	1990	1995	2000	2005	2010	2015	2020	2025	2030
A	13,325	16,212	19,725	23,998	29,198	35,523	43,222	52,583	63,976
B	1,840	2,016	2,208	2,418	2,649	2,902	3,178	3,482	3,814
C	75	91	111	135	164	200	243	296	360
D	1,845	2,021	2,213	2,423	2,655	2,909	3,185	3,490	3,823
E	13,300	16,182	19,688	23,954	29,144	35,457	43,142	52,486	63,857
F	55	74	98	131	174	232	309	412	549
G	14	17	21	27	33	41	50	63	78
H	41	57	77	104	141	191	259	349	471
I	55	74	98	131	174	233	310	414	551
J	−6	−8	−11	−15	−20	−27	−37	−50	−68
K	1,462	1,804	2,227	2,749	3,393	4,188	5,169	6,380	7,875
L	0	0	0	0	0	1	1	2	2
M	3,281	3,712	4,200	4,752	5,376	6,083	6,882	7,786	8,810
N	3,294	3,726	4,216	4,770	5,397	6,106	6,908	7,816	8,844
O	3,451	3,762	4,101	4,470	4,873	5,312	5,790	6,312	6,880
P	75	87	101	117	135	157	182	211	245
Q	3,444	3,755	4,093	4,462	4,864	5,302	5,779	6,300	6,867
R	15	17	21	25	30	35	42	51	60
S	1,455	1,448	1,419	1,361	1,269	1,133	946	696	369
T	1,523	1,528	1,512	1,470	1,395	1,280	1,117	895	601
U	−133	−169	−213	−271	−342	−436	−551	−700	−890
V	−1	−2	−2	−2	−3	−4	−5	−6	−8
W	1,921	2,227	2,581	2,992	3,469	4,022	4,662	5,405	6,266
X	+4	+5	+6	+8	+10	+12	+16	+20	+26

APPENDIX D
COBALT

Co	~~1990~~	1995	2000	2005	2010	2015	2020	2025	2030
A	61	76	95	117	147	182	227	284	253
B	29,555	32,650	36,045	39,967	44,178	48,811	53,949	59,665	65,926
C	12	15	19	23	29	36	45	56	70
D	32,670	36,118	39,930	44,145	48,840	53,955	59,649	65,945	72,905
E	~~58 84~~	~~72,68~~	~~90 72~~	~~112,98~~	~~140 112~~	~~174140~~	~~217174~~	~~270217~~	337
F	166	228	316	430	597	817	1,126	1,558	2,141
G	54	60	66	73	81	90	99	110	121
H	112	168	250	357	516	727	1,027	1,448	2,020
I	185	255	353	480	668	914	1,260	1,742	2,394
J	−12	−17	−26	−37	−50	−75	−111	−159	−231
K	4	5	7	9	11	15	20	26	34
L	19	27	37	50	71	97	134	184	253
M	16	16	16	16	16	16	16	16	16
N	19	19	19	19	19	19	19	19	19
O	9	11	12	15	17	20	24	28	33
P	12	14	15	17	20	22	25	28	32
Q	8	10	11	14	16	18	22	26	30
R	27	37	45	62	78	101	134	173	225
S	−3	−3	−3	−2	−3	−2	−1	0	+1
T	8	10	11	14	16	18	22	26	30
U	−350	−459	−547	−698	−914	−1,069	−1,366	−1,715	−2,121
V	3	4	5	6	8	10	13	16	20

APPENDIX E
MANGANESE

Mn	1990	1995	2000	2005	2010	2015	2020	2025	2030
A	14,258	16,132	18,252	20,650	23,364	26,434	29,908	33,838	38,284
B	156	177	200	226	256	289	328	371	419
C	794	899	1,017	1,150	1,302	1,473	1,666	1,885	2,133
D	161	183	206	233	264	298	338	383	432
E	13,918	15,747	17,816	20,157	22,806	25,803	29,194	33,030	37,370
F	68	87	112	143	183	233	300	384	490
G	14	16	18	20	23	26	29	33	37
H	54	71	94	123	160	207	271	351	453
I	70	90	115	147	188	240	309	395	505
J	−21	−29	−41	−57	−79	−109	−152	−211	−293
K	4,286	5,265	6,457	7,945	9,759	11,988	14,726	18,089	22,221
L	2	3	3	4	5	7	9	11	14
M	2,840	2,840	2,840	2,840	2,840	2,840	2,840	2,840	2,840
N	2,928	2,928	2,928	2,928	2,928	2,928	2,928	2,928	2,928
O	1,699	1,839	1,991	2,155	2,333	2,526	2,735	2,961	3,205
P	794	835	877	922	969	1,019	1,071	1,125	1,183
Q	1,658	1,792	1,946	2,105	2,275	2,467	2,672	2,889	3,130
R	8	10	12	15	18	22	27	34	41
S	905	1,004	1,114	1,233	1,364	1,507	1,664	1,836	2,022
T	1,658	1,792	1,946	2,105	2,278	2,467	2,672	2,889	3,130
U	−126	−150	−178	−212	−252	−300	−357	−425	−505
V	1	2	2	2	3	3	4	5	6

The Diplomacy of "Yes . . . But" and "Reluctant Consent": Some Thoughts on the Draft Treaty on the Law of the Sea, 1980

(By L. F. E. Goldie)

I. INTRODUCTION

When I was told of this evening's entertainment I felt that I had been invited here to be the Devil's Advocate and to speak to a theme of Good versus Evil. As far as I am concerned, however, His Infernal Majesty can speak for himself. I, in common with many critics of the present Draft United Nations Treaty on the Law of the Sea, do not accept the "take it or leave it" appraisal of the Conference's work product underlying that title. Nor is the issue one of World Order versus World Chaos. One thing seems sure, a compromised, packaged and internally inconsistent, cobbled-together device which arcanely reflects ambiguity masquerading as consensus, expropriation as a "new international economic order" and power without responsibility, as do, in particular, the Treaty's provisions relevant to deep seabed mining, is no "global victory for the rule of reason and the dominion of law". The former customary regime of the oceans had a truer claim to that encomium.

A common and perhaps too facile premise for some commentators on the politics of deep seabed mining issues is that a basic controversy in the Third United Nations Conference on the Law of the Sea arises from the direct confrontation of selfish mining interests against international distributive justice. By contrast, it is my observation that the challenges which have so complicated that Conference have arisen from the pitting of opposing blueprints of economic development, theories of legal order, and political ideologies. Thus, a confrontation certainly exists. But it is a collision about fundamentals, not about superficial matters. Nor is it one of simple possessive greed. This more basic antithesis reflects my concern. It demands a greater solicitude, than has been witnessed to date, for international fairness, validity, notice and what we may call "constitutionality", in the sense of due process, limitations on the excessive use of power and restraints on the abuse of rights. Currently, in international fora, it is often possible to find valid and fundamentally important claims of self-determination, human dignity and welfare becoming interwoven with, and diverted by, a hue and cry after fabled villians and other chimera. This has happened in the Third United Nations Conference on the Law of the Sea.

My brief commentary will indicate some of the more salient parts of the treaty which, I respectfully suggest, requires review, renegotiation and a more sincere reconciliation of ideological differences. Reconciliation should also include the harmonization of economic opportunities with economic needs as well as with economic capabilities. My catalogue will certainly not be exhaustive, and the topics I take up will be indicated merely as examples of the malaise they reflect. They are: (1) Constitutionality; (2) Conditions of Access; (3) Technology Transfer; (4) Representation; and (5) "Jus Cogens".

II. "CONSTITUTIONALITY" IN PUBLIC INTERNATIONAL LAW

A. Binding a state without its consent

In the international arena, pseudo-prescriptive exercises which lack appropriate communication, interaction, shared values and expectations impose excessive stresses on the mutual tolerances which exist at any given time to control community expectations of acceptable, or at least, supportable, behavior in the community of states. When these mutual tolerances are exceeded, purported constitutive prescriptions fail to convince or to be credible. Furthermore, pressures to impose such prescriptions without establishing the essentials of common goals and values, mutual consent and shared perspectives and purpose, burden the international community and its law-making processes with stresses on its acceptability as a regime. This bodes ill for the effective future of other and possibly, more valid developments in the international law of the sea. The need for the shared values, perspectives, purposes and basic prescriptions in a legal order calls for that degree of common ground and predictability which the term "constitutionality" may validly denote in the international setting.

While the current law of resources winning in the commons of mankind is admittedly antiquated, it still has a claim on the necessary morality of obedience

to law, and should only be changed by what has just been stipulated to connote valid constitutional processes. Today there is widespread acceptance of an important prudential value of international law that sovereign states are, given the current turbulence of their relations, the bulwarks of their peoples' freedoms. In such an armed and violent world freedom of a people's consent to new obligations which a political mood of the majority, or of the powerful, might otherwise cast upon it becomes a fundamental protection of the unarmed, the underarmed and the indecisive. Impositions, furthermore, can only create the expectation of further violations of independence and security in the future. These may feed upon themselves and become of possibly ever-increasing severity. While not looking merely to the traditional criteria for determining whether, or when, a new rule of international law has emerged individual states' intentions, reliances, expectations, hesitations, and downright opposition are still of crucial importance. Consent by states expressly or impliedly but fully given is still a far more important element in international law than is consent by each citizen to the content of each domestic law. Thus state consent should not be cavalierly overridden. We may point out, moreover, that the more highly charged politically or economically the tasks of an international institution are, the more deference should be accorded to the consent of each burdened state, and the more recognition there should be of its needs, sensitivities, interests and goals. Otherwise its political frustrations may cause it to undermine, destroy, or at best emasculate the institution and render it ineffective to carry out even routine functions.

B. Acquired rights

At present, customary international law provides for the lawful taking of nodules from the beds of the high seas. While the high seas are common to all nations and cannot be appropriated by anyone or any nation, the wealth they contain can become the object of proprietorship. This distinction is illustrated by Grotius's quotation from Plautus:

> [W]hen the slave says: "The sea is certainly common to all persons," the fisherman agrees; but when the slave adds: "Then what is found in the common sea is common property," he rightly objects, saying: "But what my net and hooks have taken, is absolutely my own."

Grotius also pointed out that states and individuals may not assert dominion over the air and sea which are "common," or "public," but that wild animals, fish and birds may be reduced to possession "[f]or if any one seizes those things and assumes possession of them, they can become the objects of private ownership."

By analogy with Grotius' traditional examples of fish and game, individuals have had the right of lawfully taking ambergris, sponges, pearl oysters, chanks, corals, beche-de-mer, green snails, treasure from abandoned wrecks, and other ownerless items of food and wealth from the sea floor, after these items have been found and reduced to possession in areas beyond the limits of any national jurisdiction. When the scientists aboard HMS Challenger took the first manganese nodules found by Man from the seabed and claimed them on behalf of the expedition, their right was not questioned. Justification for the appropriation is found in the right to take and own masterless goods which are capable of being possessed. At that time, the distinction made by today's commentators between the taking of resources for purposes of "scientific research" or "exploration" and the taking for purposes of "exploitation" was not recognized, and even today does not indicate a legal prescription.

The tradition Grotian justification for appropriation of goods is not the only one to be found in international diplomatic practice. The history of mining on Spitzbergen when it was *terra nullius* (masterless land), that is before the Treaty of Paris of 1920, is illustrative. In that agreement, the participating states withdrew their individual, inchoate claims to the Archipelago and quitclaimed them to Norway, subject to the retention of their nationals' existing rights. These were assumed to have already been acquired (presumably under international law). Norwegian sovereignty was also recognized as subject to other limitations. Each of the interested countries based its diplomatic posture on the assumption that general international law had previously given, and would continue to give, its nationals not only title to coal which they had severed from the ground and brought under physical control, but also exclusive mining rights over the unsevered and untouched coal measures lying in the ground within their mining tracts. It should be noted that public notification had been given of the miners' claims, and recording had been appropriately effectuated in the period when the Archipelago was *terra nullius*.

To the extent that the present Draft Treaty on the Law of the Sea would abridge analogous rights of acquisition of seabed resources, it is incumbent on the Delegation to renegotiate it so as to assure congruence between it and the guarantees in Title II, Sections 201–03 of the Deep Seabed Hard Mineral Resources Act of 1980, 94 Stat. 553, 30 U.S.C. §§ 1401–71 (1980) [hereinafter "the Act"]. This states the intent of the Congress to be that any international agreement to which the United States becomes a party should provide, *inter alia*:

(1) assured and non-discriminatory access to the deep seabed hard mineral resources;

(2) security of tenure to United States citizens whose rights have accrued prior to the Treaty's entry into force with respect to the United States;

(3) continued exploration and recovery activities on the part of United States citizens "to the maximum extent practicable consistent with" the Treaty; and

(4) protection of interim investment.

The implementation of these four guarantees constitutes a mandate by the Congress to the Department of State and to the United States Delegation. Yet under the Treaty these principles would appear to be "more honored in the breach than the observance".

III. CONDITIONS OF ACCESS

This has been proved one of the areas where a vast abyss has been permitted to widen between the directives of Title II of the Act and the Treaty as it now stands. The Treaty both limits access and provides for the Authority's exercises of an, in effect, unexaminable discretion to prohibit. The "conditions" in the Treaty are not merely requirements which may (or should) be within the capacity of a competent miner to fulfill, rather they constitute extraneous factors beyond his control, and include considerations which can only be established in terms of the unexaminable subjectivities of the deciding agencies. Indeed many of the Treaty's prerequisites cannot, by the nature, as well as the politics, of the subject matter, be made the bases of accountability let alone objective decision-making. They include for example:

(1) The policies laid down in Article 150—for example (a) expansion of participation by developing states; (b) transfer of technology; (c) price fixing and production limitation; (d) "avoidance of unnecessary waste";

(2) Categories of "permitted miners", i.e., (a) private firms and public corporate entities under the "sponsorship" of members states; (b) members states themselves; (c) the Enterprise; and (d) presumably joint ventures amongst any of those entities in (a) and (b) and the Enterprise. Briefly, this means that designated officials have free choices, not only among the various categories of applicants, but among individual applicants themselves, especially when seabed production approaches limits set in terms of the interests in play. These interests are various and disparate. They are represented by the Enterprise, by both privately and state owned ocean mining enterprises, or by land-based producers, both "developed" and "developing";

(3) The required relationship between each applicant and the Authority (including the "banking system"). Here the claims of the Enterprise to be a partner in a joint venture, or to be the recipient of technology transfer and of other special privileges are beyond objective review; and

(4) Approval of the applicant's "Plan of Work" again is unexaminable in terms of objective criteria.

We are, of course, a nation of optimists. Accordingly we hope that, despite the Treaty's creation of unexaminable discretions and despite the possibility that these may be exercised, from time to time, to the disadvantage of the United States, by and large the powers granted in the seabed mining provisions will be exercised reasonably. But that leaves us with an important question unanswered. Should we listen only to what Hannah Arendt has called "the rationalizing liberal within us . . . wheedling us with the voice of commonsense"? Or may this involve too great a gamble?

Should several American applicants seek production quotas at a time when there are outstanding applications from the Enterprise and from contractors of other nationalities, which together would exhaust the available quota (as fixed in light of the criteria adumbrated above), there would seem to be no reasonable assurance that more than one of the Americans would be successful—and

perhaps not even one. At the moment there are three American deep seabed hard mineral consortia which have made considerable investment in pioneering this new endeavour. Under the Treaty, such a number of possible competitors strongly militates against the chances of each being awarded a contract when, and if, there are also applications from other countries and the Enterprise.

Finally, we should note that not only must the applicant miner run the gauntlet of unreviewable subjectivities as conditions precedent to his possibly becoming vested with a production quota, but also there are conditions (frequently dubbed by old fashioned conveyancing lawyers as "conditions subsequent") which turn on decision-makers' subjectivities and which can, after the vesting of a right to mine, cause the grantee's interest to divest. This notion of "vesting subject to divesting" is illustrated by some of the difficulties connected with technological transfer. One particular inequity in this context results, of course, from its rendering an investment (in the financial sense) subsequently valueless causing great loss and waste.

IV. TECHNOLOGY TRANSFER

The Treaty reflects, confusedly, a number of different systems for regulating technology transfer which have been concurrently formulated without clearly resolving the scope of each, or indicating which should prevail in the event of inconsistent or possibly alternative applications. Nor is there any clear separation of the privilege of access from the burden of transferring a valuable property. In fact, the former appear to be made dependent upon the latter, even when the grant of access may precede the requirement of technology transfer in time.

First, we may review Article 144 of the Draft Treaty. Here we find that a number of questions are left open in its relationship with Article 274. While Article 144 deals with the transfer of deep seabed mining technology, the scope of Article 274 is broader and covers scientific research as well. Secondly, Article 144 does not indicate what is meant by "programs for transfer of technology." This is a most important issue to be left beclouded. Since, in the western industrialized states, private enterprises, rather than the states themselves, own seabed mining technology, an important question must be answered. How should the states acquire the technology to be transferred by them? By creating tax and other incentives for transfer? Or by expropriating the owners outright of their properties? The United States Senate might be reluctant to join a regime which could, or rather would, become so expensive to the American taxpayer.

While, perhaps, the wording of Article 144 may not appear to invest the Authority with a monopoly of coordinating the transfer of technology, the administration of the provision must tend, almost inevitably, to concentrate that power in the hands of Authority's officials.

When, further, we connect Articles 150 (b) and (c), Article 151, paragraph 8, with Annex III, Articles 5(j) and 12 we see that the Authority may require the contractor to make available to the Enterprise, "on fair and reasonable terms," the same technology as that to be used by the contractor in his operations. The sanction for failing to agree with the terms of transfer carries a very severe penalty. The negotiations for the transfer are intended to take place after the applicant has received a contract, hence after he has laid out his investment—which he is thereupon in jeopardy of losing. Nor does this procedure for technology transfer carry any reciprocal benefits for the contractor. Only the Enterprise gains. Under it, the contractor is placed in a "no-win" situation: antithetically the Enterprise is in a "no-lose" one. The Treaty's third system is one whereby the Authority can tie negotiations for technology transfer to the grant of access. If no agreement on the transfer of technology is reached, the applicant will not receive a contract. Whereas the second system adumbrated above may be subject to binding arbitration, under this third approach the decision of the Authority cannot be reviewed by the seabed dispute chamber.

The more general difficulties regarding the transfer of technology provisions are: (a) lack of clarity of the technology to be subject to the regime of transfer; (b) uncertainty as to how the transfer could take place; (c) financing and compensation problems; and (d) lack of reciprocity—the Enterprise is not obliged to transfer technology.

Turning to the connection between access to mine the seabed and transfer of technology, we must emphatically stress the importance of the interrelationship between the system to be established and the transfer of technology. Transfer of technology will differ depending on which of the various forms of access is to be applied. The main blue-prints for systems are: (a) a "unified system"

which permits only the Authority to engage in mining, hence there is no access by privately owned mining companies or state owned enterprises in this category; (b) a "unified system" whereby other entities may also mine, but only in joint ventures with the Authority, with this system, mining enterprises' access will necessarily be dependent on their joint venture agreements with the Authority; (c) the "parallel system" whereby the Enterprise and state licensed entities have a regulated access to mining the deep seabed; and (d) a licensing system whereby only entities licensed by states may mine. Under this last system the most extensive privilege of access is assured. Of these four methods only (b) and (c) raise relevant issues. For (d) is politically not feasible, and under (a) transfer of technology to third parties (i.e., developing countries) would merely waste resources (as they would have no use for it), and since technology transfer to the Authority would be replaced by service contracts. Under (b) we may consider transfer to the Enterprise as "economically unjustifiable." On the other hand, there could be a case for doing so in favor of developing countries. Under (c) it is arguable that developing countries should be placed on a more equal footing with the Enterprise in obtaining technology, and that full compensation should be paid to the enterprise owning the technology in the first place. But, in that context, we may be apprehensive that the developed countries' hopes for free access would be compromised.

In sum then, we may perceive that the real "common heritage of mankind" (including that of the Soviet Bloc) is the technology of the western developed private enterprise democracies. In this regard, even their discoveries in the sphere of advanced defense technology may not be immune, especially if the scientific premises of such technology also serves the peaceful purposes of seabed mining. Ironically, this reverses the old adage about beating swords into ploughshares, since to use such a technology for mining purposes makes it transferable, leaving the miners' state with the choice of authorizing the transfer or of handicapping the miner competitively through denying him the right of using the technology for the peaceful purpose of mining. Our domestic statutes on the subject will still be binding domestically. Internationally we will be put to the choice of allowing the miner to "put up" the sensitive technology as a price of obtaining a site or of "shutting up".

V. REPRESENTATION

Unlike INTELSAT, even after its recent changes to accommodate to the demands of the Group of 77, the organs established in the Treaty for the seabeds regime carry no weighted representation or voting in favor of countries with the strongest interest in, and the heaviest anticipated use of, the deep seabed resources. States with little or no effective capability or interest will have votes to trade for benefits in other institutions and contexts. States with capabilities will feel handicapped in implementing their goals through a lack of political effectiveness commensurate with their technological and economic capabilities. On the one hand the Treaty creates power without responsibility, on the other, responsibility without power.

Let us recall that within the Authority there is a "supreme" Assembly composed of all states which are parties to the Treaty. It is to be responsible for general policies. Its decisions are to be made on the basis of "one state one vote". Questions of substance will require determination by a two-thirds majority. On the nomination of regional and other designated interest groups the Assembly is to elect the Executive Council under a complicated system. The Assembly also has the power of final approval of the Council's provisional rules and regulations. The Council, composed of thirty-six states reflecting "equitable geographical distribution" and various political and economic interest blocs, is intended to deal with specific policies, adopt and provisionally apply rules and regulations (pending final Assembly approval), act upon applications for contracts to mine the seabed, and, subject to Assembly approval, make financial decisions.

The Assembly chooses the Council periodically from nominations by the various designated blocs. Thus eighteen seats are provided on the basis of geographical distribution (the Eastern European Bloc and the "Western European and others" (including the United States) are to have at least one each). The remaining eighteen seats are distributed among special interest groups as follows: Four seats are allocated among eight states with the largest investment in seabed mining (including at least one from the Soviet Bloc—presumably whether or not it has engaged in any, let alone substantial, investment). Then four seats are to

go to the group of states which have consumed, or imported, established high levels of minerals of the categories to be extracted from the seabed.

This group, too, is required to include at least one Soviet Bloc nation. Again, four more seats go to the major net exporters, and the final six seats are allocated by developing countries representing particular interests—including large populations, land-locked or geographically disadvantaged situations, major importers or producers of the relevant minerals, and the least developed. Here an irony should be stressed. While the Soviet Union, possibly because of the vast potential wealth of her Siberian treasure house, has shown little practical interest in engaging in deep seabed mining, is assured, either directly or by proxy, of no less than three seats on the Council. By contrast, the United States is not guaranteed even one seat. Of course she may win a seat through political influence, or perhaps (theoretically) two or even three, but this does not allot to her a voting authority commensurate with her pioneering investment. Indeed, the system is one clearly whereby the countries with the investment and skills to develop deep seabed mining are not only under-represented, they are also forced to compete amongst themselves for the limited votes which have been vouchsafed to them as a group. On the other hand, countries which have no direct interest, indeed possibly no concrete interest at all in the development of this new source of human well-being, can trade votes amongst themselves. That such power has been taken from states with a need for it and has been given to states lacking any concrete interest in developing seabed mining, or states with a definite interest in restraining its development and limiting its production, has been guaranteed by the Treaty's elaborate compartmentalization of the Council into pressure blocs and caucus groups.

There is neither a Great Power Veto, as in the Security Council of the United Nations, nor the weighting of the votes in individual states as with INTELSAT'S Board of Governors (votes weighted in terms of share participation). Instead, a complicated voting system has been established. Questions of substance require two-thirds or three-fourths majorities, or qualified or unqualified consensus, depending on the category of issue.

There is provision for a Legal and Technical Commission to be composed of qualified personnel, but its composition is required to give effect to the principle of "equitable geographical distribution" and be representative of special interests. It is to make recommendations to the Council regarding the approval of any mining application. The Council can only reject such a recommendation by consensus. But the sponsoring state may not participate in this vote. On the other hand, if the Commission recommends disapproval of a mining application, the Council may approve the application (thereby rejecting the Commission's recommendation) by only a three-fourths vote. The expressed good intention is that the Commission should be technical rather than political. But, given the type of voting directives or considerations expressed in the Treaty, may we not be reminded of a proverbial highway said to be "paved with good intentions"? I urge that this Commission be reviewed so that its electorate will be more consonant with, and responsive to, the goal of technical objectivity.

This structure is particularly significant for the United States as this country is most likely to have the greatest number of qualified applicants. We may also point to a probable scenario. A United States applicant could be confronted by a coalition of land-based mineral producers, Western states sponsoring ocean mining competitors, Soviet Bloc and developing country opposition, states in each group might well have their own reasons, possibly disparate from all the others, of blocking approval of a United States-sponsored application. The United States, not being permitted to participate in the vote, might not find it possible to find a single state to break the consensus needed to reject a Commission recommendation of approval. This situation has its converse. If the Commission were to approve on political grounds, an unqualified applicant, the United States could not anticipate achieving a consensus Council decision to override a politically biased recommendation by the Commission for approval of an unqualified applicant.

The Authority, moreover, is entitled to represent all seabed mineral production in international commodity arrangements. Given the exiguousness of the United States and Western European effective representation in the Authority's deliberations, and the strength of present, let alone potential, land-based producers in the relevant bodies, one can see a poor outlook for the ocean mining industry in such agreements. (Parenthetically it should be pointed out that

commodity agreements are greatly favored over the free market, these days, in international trade in order to force up the prices of raw materials at the expense of distribution and manufacturing and, of course, the ultimate consumer.) In the negotiation of the relevant agreements there could be land-based Trojan horses within the Authority which would, in effect, give those suppliers a double representation. The result, clearly would be heavily weighted against the western democracies and the consumers in the market economies, not only as far as ocean mining is concerned, but also in terms of their interests in having alternative sources of supply. Thus Representation becomes a most important issue, not only in terms of the United States having a direct say, but also in terms of the world market sources, supplies and prices. My pessimism in this regard is strongly reinforced by the consideration that amongst the states with possibly crucially effective votes will be those with no direct concrete interest in the outcome of the negotiations. Their votes will be available for trading for other advantages in other contexts.

VI. DISCRIMINATORY TAXATION AND "BANKING"

A. Discriminatory taxation

A brief look at the Authority's prerogatives in the collection of revenue shows that this discriminatorily favors the Enterprise and, indeed, developing countries' land-based producers of the minerals to be found in manganese nodules. The mining taxes so collected are to be front-end loaded and amount to figures ranging from, approximately, $527,000,000.00 to, approximately $1,300,000,000.00 depending on each operator's profitably. At the moment there is a debate in the United States about whether or not the assistance derived from seabed mining to be paid to developing countries will include assistance to so-called National Liberation Groups, for example, the PLO. I am, myself, distressed by the ambiguities which have given rise to this debate, without taking sides in it.

In contrast with the heavy taxes to be levied on private and state-owned enterprises, it should be noted that the Enterprise, under Annex IV, Article 10, paragraph 3, is to be exempted from making payments to the Authority for up to ten years.

B. "Banking system"

When Secretary of State Kissinger launched his negotiations (in 1976) to achieve open access (under the "parallel system") to minesites for state-sponsored industry, without discrimination or reference to country or type of ownership, he offered the Conference, as a *quid pro quo*, a number of bargaining concessions including the so-called "banking system". By this system a contract applicant was obliged to prospect two complete mine sites, of which the Authority would choose one. The chosen site, and the data developed as a result of the prospector's efforts, would then be available for mining either by the Enterprise or by developing countries. The rest is history. Dr. Kissinger's goal of free access was finessed, even while his banking proposal and other concessions were added to the obligations of the developed countries' ocean miners.

VII. A PEREMPTORY NORM?

Clearly with an intention of undercutting the United States' Deep Seabed Hard Mineral Resources Act of 1980 and similar legislation by other western industrialised democracies, and of inhibiting negotiations for regimes of mutual recognition amongst reciprocating states, for example as contemplated under Section 118 of the Act, Chile proposed, at the Ninth Session (Second Part—Geneva, 28 July–29 August 1980) of the Third United Nations Conference on the Law of the Sea that the status of the hard mineral resources of the deep seabed as the "common heritage of mankind" be considered *jus cogens*, that it, as a peremptory norm. The Chilian Draft was as follows:

Jus cogens

> The States Parties to the present Convention accept and recognize on behalf of the international community as a whole that the provision relating to the common heritage of mankind set out in article 136 is a peremptory norm of general international law from which no derogation is permitted

and which, consequently, can be modified only by a subsequent norm of general international law having the same character.

Our delegation's response appears to be to have exemplified much of what has gone wrong with the negotiations at UNCLOS III. The Western European countries and Japan spoke strongly against this proposal. The Soviet Union pointed out, correctly, that no treaty exists which creates a peremptory norm except for the Charter of the United Nations, and that such a proposal was outside the competence of the Conference. Our position was a combination of "yes . . . but" and a "reluctant consent".

For, rather than joining with the Soviet Bloc and the western democracies in rebuffing this initiative, we compromised on it. After negotiating on a formula incorporated into Article 305 of the Informal Composite Negotiating Text, Revision 2, we accepted the following statement in what became Article 311, paragraph 6 in the Draft Convention on the Law of the Sea: "The States Parties to this Convention agree that there can be no amendments to the basic principle relating to the common heritage of mankind set forth in article 136 and that they shall not be party to any agreement in derogation thereof."

It may be asked, reading these two provisions together, what the new paragraph achieves. Starting from the premise that parties accepting it intend that it should not be entirely pointless then, clearly, it means more than a promise not to be in breach of Article 136, for this would merely make the paragraph redundant.

It should be noted, moreover, that Article 136 says nothing substantive about "common heritage". Accordingly, it is at least arguable, and no doubt will be argued by supporters of the *jus cogens* thesis, that the express incorporation of Article 136 into the above "compromise" paragraph necessarily carries with it the implication that it should be interpreted in light of Article 137 which states:

"1. No State shall claim or exercise sovereignty or sovereign rights over any part of the Area or its resources, nor shall any State or natural or juridical person, appropriate any part thereof. No such claim or exercise of sovereignty or sovereign rights, nor such appropriation shall be recognized.

"2. All rights in the resources of the Area are vested in mankind as a whole, on whose behalf the Authority shall act. These resources are not subject to alienation. The minerals derived from the Area, however, may only be alienated in accordance with this Part and the rules and regulations adopted thereunder.

"3. No State or natural or juridical person shall claim, acquire or exercise rights with respect to the minerals of the Area except in accordance with the provisions of this Part. Otherwise, no such claim, acquisition or exercise of such rights shall be recognized."

The apologists for paragraph 6 of Article 311 argue that it adds nothing to paragraph 3 of the same Article. They say that that paragraph already reproduces the Vienna Convention on the Law of Treaties's prohibition against derogations. Three arguments would appear to be responsive to this defense. First, it is contrary to the interpretation of any document, and especially of a treaty, to interpret any clause as if it added nothing to it, unless no other interpretation is possible. Secondly, paragraph 3 reads as a permissive clause which also sets limits to what is permitted. Paragraph 6, by contrast, reads as a flatly prohibitory clause. Thirdly, paragraph 3 reads as an invocation of Article 18 of the Vienna Convention while the legislative history and formulation of paragraph 6 point to Article 53 (the *jus cogens* Article).

Finally, independently of the foregoing considerations, a strong point could, and if the opportunity arises no doubt will, be made to the effect that paragraph 6 is available to those who argue that it hedges the Group of 77's perception of the "commons heritage" about with the protection of *jus cogens*. This is to be found in the clause's *travaux préparatoires* outlining its provenance. In his *Explanatory Memorandum of the Conference* (U.N. Doc. A/CONF. 62/W.10/Rev.3/Add 1, mimeo., 28 August 1980) the President of the Conference wrote, at p. 3:

"The other item dealt with under General Provisions was the concept of *jus cogens* on which a compromise formulation was accepted. . . . It was agreed that it incorporated as a new paragraph 6 of Article 311 of the Final Clause on relations to other conventions and international agreements."

This explicit reference to *jus cogens* surely embeds in concrete the idea that paragraph 6 establishes the *jus cogens* status of Article 136 and by necessary implication, Article 137.

In light of these considerations it is regretfully suggested that should the United States negotiate a treaty (a "mini-treaty") with states, such as France and the Federal Republic of Germany for example (of whom the former is currently reported to be actively considering the enactment of similar domestic legislation to the United States' recently enacted seabed mining law, the latter having already done so), it would be arguable that such action would be vulnerable to attack, not only diplomatically and in such fora as the General Assembly of the United Nations, but domestically as well. I much also stress that *jus cogens* may not only operate to render an international agreement null under Article 53 of the Vienna Convention on Treaties, or to exculpate a state from a contractual obligation, but also to stigmatize such conduct as an international crime. For example, Judge Roberto Ago of the International Court of Justice wrote, as the Rapporteur of the International Law Commission on State Responsibility, in his comment on his Draft Article 19, "International Crimes and International Delicts" and on the international criminal nature of the types of conduct therein dealt with:

"The Commission therefore decided to follow the system adopted in the first instance by itself, and subsequently by the Vienna Conference, for determining the 'peremptory' norms of international law. . . . What it is intended to ensure is that a given internationally wrongful act shall be recognized as an 'international' crime, not only by some particular group of States, even if it constitutes a majority, but by all the essential components of the international community. ('State Responsibility' *Report of the International Law Commission on the Work of its Twenty-eighth Session (3 May–23 July 1976)*, 31 U.N. GAOR, Supp. No. 10, 162 at 286–87, U.N. Doc. A/31/10 (1976)."

Even although arguments to the effect that seabed mining is, by virtue of paragraph 6 of Article 311 of the Treaty, an international crime like, for example, piracy or genocide, would not be analytically, juridically or intrinsically strong it could, clearly, reinforce the passion with which American seabed activities are being attacked as "robbing the common heritage". Here again, our generously conciliatory approach would appear to have done little more than achieve a mousetrap effect on our own interests and purposes.

VIII. CONCLUSION

In conclusion two points may be made. The former relates to choices, the latter to approach.

A policy choice would appear to have been made which is respectfully dissented from in terms of both prudential considerations and the reality of making the choice in the first place. It would appear that most of the developed, industrialized countries of the West have tended to view the seabed mining issues as lacking the immediacy and saliency of many other matters being negotiated at the Third United Nations Conference on the Law of the Sea. Indeed, in the light of the vulnerability of the United States and the other Western industrialized countries generally to the cartelization and pricing of raw materials in general, it is surprising that lessons have not been learned and that concern has not surfaced adequately. When these considerations are added to the known facts of the political instability and the potentiality, if not actuality, of ideological hostility of most of the countries from which many of the essential minerals contained in the seabed's manganese nodules are now imported, it is respectfully suggested that the present hierarchization of the various interests which the United States Delegation is called upon to espouse is mistaken. Such a hierarchization, moreover, appears to reflect internal, inter-departmental, struggles which have tended to sap, indeed undermine, the strength of the overall U.S. diplomatic posture.

A law of the sea regime lacking United States participation in terms of technology and financial contributions would, furthermore, obviously be a lame thing, an institutional structure with little if anything to regulate—possibly a bureaucrat's dream but a truly non-viable product of diplomacy. Accordingly, it is in the interest of all who sincerely focus their goals on a viable treaty, to negotiate a regime, or a series of interlocking regimes, which can command, at best, more than a reluctant consent on the part of the United States and of all the developed countries of the West.

Secondly, as a pragmatic people we look to the matter rather than the manner. On the other hand, it has been my thesis that the gratuitously conciliatory

manner in which the United States Delegation has approached the problem of deep seabed mining has been the major reason, and a largely unnecessary reason, why the Treaty's provisions on deep seabed mining have been permitted to cut so lethally against the major long term interests and resource needs of the United States and other industrialised economies of the democratic West. The manner of negotiation has shaped the matter of the draft Treaty with deleterious results.

[From the New York Times, Apr. 10, 1981]

DON'T SCUTTLE THE SEA LAW; IMPROVE ITS DRAFT

TO THE EDITOR: I am concerned that William Safire's March 18 column "The Great Ripoff," on the proposed Law of the Sea Treaty, will be read by many as a basis for jettisoning the whole treaty rather than seeking needed improvements.

Leaving to one side for the moment the provisions of the treaty dealing with the deep seabeds, I believe strongly that the remaining provisions are very much in this country's national interest; moreover, these articles—providing for a 12-mile territorial sea, transit through international straits and archipelagoes, a 200-mile economic zone, national resource jurisdiction over the continental margin, protection of the environment, scientific research and dispute settlement—constitute a well-balanced package not merely in the interest of the maritime industrialized countries but of the international community as a whole.

Safire's article implies that the navigational provisions are solely in the Defense Department's interest. This ignores how important it is to our petroleum companies and other shippers of raw materials to have treaty-guaranteed transit rights through international straits and other maritime choke points. He suggests, that we could have the navigational rights even in the absence of the treaty on the basis of customary international law and would use force to exercise our rights if necessary. However, customary international law is neither so unambiguous nor so effective as explicit treaty provisions protecting our navigational rights.

My own experience as Legal Adviser to the Department of State would indicate that, while the U.S. Government would doubtless be willing to use force if there were any attempt to close the Straits of Gibraltar, this is not necessarily true in the case of other straits or archipelagoes. The State Department's political officers, conscious of the political costs of exercising customary rights against claims of national sovereignty, have in the past recommended against the exercise by our Navy of customary transit rights because of their concern about the cost to our bilateral relations. In the absence of a treaty, it would be unrealistic to expect naval or even strong diplomatic support for nonmilitary transits (by oil tankers, for example) where coastal states are asserting environmental rights, undefined or limited by treaty, as a matter of national sovereignty.

I agree that it is in our national interest that the seabed provisions of the treaty be improved in a number of respects, particularly the provisions imposing a production ceiling, requiring transfers of technology and, in my view most prejudicially, providing the Eastern European countries with three permanent seats on the governing Council of the Seabed Authority while guaranteeing the United States none.

However, it is important to recognize that the U.S. interest in seabed mining would not be served by having no treaty. While it has been our position that deep seabed activities could be undertaken under traditional freedom-of-the-seas principles, the United States may no more claim exclusive rights to the deep seabed than it may claim exclusive fishing rights beyond national jurisdiction.

Unlike fishing rights, exclusive rights of deep seabed mining are necessary to support the large investments and provide the security of tenure of the mining site, and they can only be assured by a generally accepted international treaty.

Safire speaks of his outrage at the proposed treaty. I, for one, am outraged by the denigration of the very real benefits to this country of many of the draft's present provisions and I would be further outraged if we do not negotiate to improve unsatisfactory seabed provisions. To scuttle the negotiations now would indeed be "The Great Ripoff."

JOHN R. STEVENSON,
New York, April 6, 1981.

The writer from 1969 to 1972 was the Legal Adviser of the Department of State and from July 1973 to May 1975 Ambassador and Chief of the United States Delegation to the Law of the Sea Conference.

Donald L. McKernan Lectures in Marine Affairs

Should We Cut Our **LOS**es?

U.S. Foreign Policy & International Regimes

Ten years have passed since the initial United Nations' resolution calling for a Law of the Sea Conference, and thirteen years since Arvid Pardo's speech at the U.N. General Assembly which stimulated renewed interest in seeking a broad-based conference. In the words of *The New York Times*, "probably not since the Code of Justinian was framed 1,500 years ago has there been an equal challenge to wit of jurisprudence."[1] With some 150-odd nations negotiating a treaty of more than 400 articles, many observers have believed it would be impossible to reach a conclusion. In their view, the matrix of 150 states by 400 issues is simply too complex to sum. Some say it should not be summed; that the outcome of the conference would be a setback for the United States as well as for a reasonable international regime for the use of the oceans.

Whatever the merits of the Law of the Sea Conference and the draft treaty, they must be seen as part of a larger international political process. To what extent does the Law of the Sea Conference reflect the present and foretell the future? Certainly, the way the law of the sea is being established today is greatly different from the way it has been handled in the past.

Since 1945, conference diplomacy has been an important feature of international life. In the last decade in particular, the United Nations has held a series of giant mega-conferences starting with the Stockholm Conference on the Environment and running through food, population, employment, habitat, science and technology, the role of women, and other issues. In general, these large U.N. conferences have tended to be discussions which try to legitimize those issues as subjects of international politics rather than specific negotiations. The Law of the Sea Conference is one of the exceptions in the sense that this conference is an effort to reach agreements and to negotiate specific rules.

Some people see the conference as a harbinger for future global negotiations. For example, the Brandt Commission has called for such global negotiations, and many less developed countries have pressed for negotiations on a broad range of North-South economic issues and new international economic order. Thus, we should question whether our response to the law of the sea process may be a precedent for other demands for broader negotiations.

At first glance one might answer that the United States should avoid participation in such mega-conferences when they try to deal with specific negotiations. Global negotiations in mega-conferences load too many issues on the table and bring too many players around it. Many small weak states that participate have only marginal interests in the negotiations at hand. Moreover, they participate in rigid blocs that have characterized U.N. procedures since the first United Nations Conference on Trade and Development (UNCTAD) in 1964. Not only do rigid blocs strengthen the hands of those with extreme positions and make compromise difficult, but the broad agenda which typifies such conferences also allows weak states with few interests to extract concessions from larger states with multiple interests through the process of linking issues. If extraneous linkage and block politics tend to benefit the small participants, then one might conclude that it is in the United States' interest to avoid such large conferences for negotiating purposes.

On the other hand, as a major power in the international system, the United States has an interest in an established world order and in maintaining international regimes. International regimes are the generally accepted rules, norms, or procedures that exist in a given issue area and govern the interactions that occur within that area. Depending on the degree of elaboration and acceptance of the norms or procedures, there may be only a quasi-regime or no regime at all. As Oran Young has pointed out, we live in a world of international regimes.[2] Regimes vary greatly in terms of their scope, their area, and their membership. Far from being unusual, what is most striking is their sheer number. They deal with everything from monetary issues to international trade, to management of natural resources, to conservation of species, to the control of armaments, and to the management of particular geographical areas.

Traditionally, great powers interested in world order have had an interest in the formation and maintenance of regimes. But also traditionally, regimes have tended to reflect the dictates of the great powers. This tradition presents us with a basic dilemma in the case of the current law of the sea political process. Many Americans, including many senators, may not be pleased with the specific conference outcome. Nevertheless, can the United States as a great power afford to turn its back on a major ten-year effort at international regime definition? Some answer "yes," arguing that a great power has the alternative of military force available to it and that American foreign policy should rely more heavily on military capabilities in the defense of our national interests. Thus, the question in my title, "should we cut our LOSes?"

I will deal with this issue first in relation to the specific problems of the law of the sea regime. Then I will explore a contrasting case—international oil—where an international regime has broken down and conference diplomacy has been suggested as a remedy (incorrectly in my view). Then I will explore a case where a favorable but eroding regime for the non-proliferation of nuclear weapons has been bolstered by a type of conference diplomacy. Finally, I will draw conclusions from these experiences for broader questions of U.S. foreign policy in relation to international regimes.

The Changing Politics of the Ocean Regime in the Twentieth Century

The politics of the oceans have grown increasingly complex in this century and along with that complexity has come regime change.

The classical regime that was generally accepted for the governance of ocean space and resources since the mid-nineteenth century was "freedom of the seas." The high seas belonged to no one and coastal-state jurisdiction was restricted within narrow limits. Customary law was enforced by the great naval powers, particularly Great Britain. Maritime powers, given their de facto superiority over ocean space, had a national interest in a regime that maximized that space. At the same time, so long as the technology of navigation, fishing, and resource exploitation was limited, a regime that treated the oceans as a commons open to all was beneficial to smaller states as well.

Thus, at the beginning of this century, states claiming jurisdiction beyond 3 miles from their coasts (Scandinavia, Iberia, Mexico, Uruguay) accounted for little of the world's coastline and less than 10 percent of world shipping. In 1902, American diplomacy forced Mexico back from a 9- to a 3-mile limit. In 1905, British protests forced Uruguay to release a ship seized for fishing in its contested waters, and in 1909, British diplomatic pressure led Portugal to accept a 3-mile limit on fishing jurisdiction. In 1915, Germany enforced a 3-mile limit against Sweden.[3]

The one area where the classical "freedom of the seas" regime did not command full adherence was in regard to shipping during wartime. Despite efforts to establish rules for the use of ocean space during wartime (conferences were held in Paris in 1856, and in London in 1909), in this area the great powers lacked the similarity of interest necessary to make limitations work during periods of belligerence. However, belligerents' use of ocean space during wartime was treated as an exception and had little effect on adherence to the freedom of the seas regime for other uses during wartime or during the ensuing periods of peace. In large part this reflected the hegemonic position of Great Britain in the oceans issue. As prime protector and enforcer of the principle of "freedom of the seas," Great Britain could grant itself de facto exceptions by interfering with neutral shipping during wartime while continuing to uphold the principle in periods of peace. When Great Britain ruled the waves, she could also waive the rules.

The free seas regime was not really at issue before World War II. Although a conference at The Hague in 1930 was unable to reach agreement in codifying limits, 20 states representing 80 percent of shipping tonnage supported a 3-mile territorial limit. This included all major powers except the U.S.S.R. (12 miles) and Italy (6 miles). Twelve states supported a 6-mile limit. Efforts by Ecuador, Mexico, and Iran to extend jurisdiction in the 1930s were met with nonrecognition. Although disputes arose in the 1920s and 1930s over antismuggling zones and fisheries arrangements, the parties explicitly accepted the legitimacy of the overall regime.

During the quarter-century after the war, the overall regime was not fundamentally challenged, but there were serious signs of erosion. As a result, the major maritime powers, particularly the United States and Great Britain, led efforts to reform, codify, and protect the regime structure. Ironically, it was President Truman's extensions of shelf and fishery jurisdiction in 1945 which unlocked Pandora's box. The United States tried to argue that these were separate issues, but it provoked the Latin American states to claim broader territorial seas. Even so, there were few other claims to exclusive sovereignty or regulation in the high seas beyond 12 miles.

In contrast, the last decade has been marked by a wider challenge to the fundamental principles of the classical free seas regime. Of the 150 or so states in the current conference, only a minority were adherents to the 1958 Geneva Convention on the High Seas (42 to the territorial sea convention, 34 to the fisheries convention, and 50 to the shelf convention). The issue of deep seabed resources and the technological developments in offshore drilling and tanker construction have raised issues about the "middle and bottom" of the oceans, which were not major problems before. Less developed countries, fearing that the commons will be exploited solely by the technologically advanced under a laissez-faire regime, have stressed broad extension of national jurisdiction and/or the need for a strong international regulatory body. Countries like Canada and Australia, once closely allied with the maritime powers on oceans questions during the Cold War era, have switched to a more coastal view of their interests. Even in the United States and Great Britain, important groups like oil companies and coastal fisheries associations have led these naval powers to assert 200-mile jurisdiction over resources.

Offshore Jurisdiction

In 1960, only a quarter of all coastal states claimed offshore jurisdiction of 12 miles or beyond. By the beginning of the current conference, more than half claimed such jurisdiction. As important as the extension of jurisdiction has been the challenge to the basic principle of "freedom of the seas." The last decade has not merely been one of "nibbling away the margins of the regime," but one of pressure for an alternative regime. The principle of *res nullius* has been challenged. The 1970 Montevideo Declaration stated that "all nations have the right to claim as much of the sea and seabed near their coasts as they deem necessary to protect their actual and potential offshore wealth."[4] The current draft LOS treaty basically fences off more than a third of the resources in the global oceans commons, and the mineral resources outside these extended national jurisdictions have been declared to be commonly owned by all nations rather than free for the taking by any nation.

There also have been important changes in the complexity and the linkage of the various aspects of the ocean policy issues. Looked at from the perspective of U.S. foreign policy, coastal fisheries and infringement of navigation to enforce antismuggling measures were the issues in the period before 1945. Since then, new issues have included continental shelf resources, distant water fisheries, breadth of the territorial sea, deep seabed resources,

arms control, freedom of scientific research, pollution, and restrictions on navigation.

Moreover, the issues have become more tightly linked. Both intra-issue and extra-issue linkages have increased during the course of the past quarter century as a result of efforts to establish agreement on an overall regime. At the Geneva conferences, discussions of a regime for the high seas, territorial sea, contiguous zone, living resources, shelf resources, and access to the sea for landlocked countries have inevitably led to increased linkage. In addition, East-West confrontations and North-South development issues affected the positions taken on votes on oceans issues.

But it is really the last decade which has seen the development of tight links among disparate subissues. In contrast to the Grotian assumption of unlimited resources that underlay the old regime, there developed a sense of actual and potential competitive usage by functions and by nations. This development in turn led to a "shrinkage of policy space"—a diminished separation among different users of the oceans. To some extent, this shrinkage of policy space reflected the real competitive uses (sea-lanes vs. drilling platforms, pollution vs. fishing), but to a large extent it was stimulated by the dynamics of conference diplomacy.

Deep Seabed Resources

The major new issue of the recent period—deep seabed resources—helped to further this linkage process. The prospect of vast treasure at the bottom of the sea increased the number of countries interested in oceans issues far beyond the number of actual major or moderate users of the oceans. With general and symbolic rather than specific interests, these new actors were a major source of linkage. The Seabed Committee established by the General Assembly in 1968 rapidly expanded from the original 35 members to 91 members by 1971. As Edward Wenk has put it, learning of their technological disadvantage on the seabed issue, the less advanced countries doggedly linked "consideration of other maritime legal regimes related to the breadth of territorial sea, rights of passage through straits, and fishing practices, all of which added not only new dimensions of complexity but also of controversy."[5]

At first the great naval powers, the United States and the Soviet Union, tried to keep the seabed separate from other issues. In 1969, both the United States and the U.S.S.R. voted against the General Assembly resolution calling for a new Law of the Sea Conference. Not until November 1970 did the United States abandon its strategy of trying to separate the territorial sea issue from the seabed issue. Essentially this move was the preference of the Navy and the Defense Department which felt other issues could be traded for protection of free access for military forces.

How Many Nations?

A final aspect of the increased complexity of oceans politics has been the dramatic increase in the number of actors involved. Between the two world wars, 40 states attended The Hague Conference in 1930. However, a study of the diplomatic correspondence during the same time period shows

serious U.S. involvement with only 15 governments. In 1945, the United States consulted four states about its shelf and fishery proclamations and seven additional states about its coastal fisheries policy. In 1958, 86 states attended the first Geneva Conference. By the time of the Caracas Conference in 1973, 149 invitations were issued, and 137 states actually participated. The major maritime states remained important, but the fragmentation of the Western bloc and the importance of leaders in the African, Latin American, Asian, and landlocked states increased the number of important states to a score or more.

This growth in the number of actors and in the number of linkages of subissues involved in oceans policy is reflected in the way our oceans policy agenda has changed during the course of the twentieth century. Before World War II, we were the country whose initiatives put oceans policy issues on our foreign policy agenda (although it was the International Law Committee of the League, searching for topics "ripe for codification," which set the agenda for The Hague Conference). After the war, it was initially U.S. government actions in response to anticipated offshore drilling and pressures by coastal fishermen that set the agenda. Subsequently, Latin American and other extensions of jurisdiction set our agenda. Today, much of the agenda results from the efforts of less developed and coastal states to control transnational fishing, to benefit from private offshore drilling, to control pollution caused by the shipping of oil, and to prevent, regulate, or benefit from transnational scientific research. Other issues, like the debate on seabed resources, arose primarily from U.N. conference diplomacy. The contrast with British naval hegemony in the nineteenth century—the simple days of fish and ships—could not be more striking.

The Debate Over the Draft Treaty

Given the political process that I have described, it is not too surprising to find a number of Americans skeptical about the draft LOS treaty that the process has produced. Some believe that it would be unwise to sign the treaty because the outcome of the process is so distant from the U.S. Senate's view of the world that the treaty could not be ratified. Indeed, some say that ratifiable or not, it is not in our interest to sign the treaty. If the United States signs the treaty, it might then come into force upon ratification by 60 states—half the Group of 77.* But if the United States then fails to ratify, it might find itself in an awkward legal position, caught between two conflicting regimes: one old, supported by a few strong states; and one new, supported by the many.

National Security Interests

U.S. critics raise several charges against the treaty. First, they argue that we have mistaken or misdefined our national security interests. As already indicated, at the beginning of the decade, we defined our security interests in terms of free passage through straits and access to as much water as possible for our naval forces. From this point of view, the great danger was "creeping jurisdiction" by coastal states and the fear that as extensions of jurisdictions to cover natural resources occurred, the extended territorial seas would interfere with movement of our naval forces. The extension of territorial seas to even 12-mile limits would close more than 100 straits of possible interest to the Navy. Thus, it was worth trying to bargain away certain aspects of the resources regime to ensure freedom of the seas for our naval forces. It was this perception which led us to agree to the comprehensive approach of a large conference with the problems of linkage and agenda that I have already described.

The critics argue that, over the course of the 10 years during which these negotiations have been prolonged, our national security interests have become more complex. Our security cannot be defined solely in terms of free passage of naval forces; raw materials have become a more significant aspect of our national security position than they were at the beginning of the decade when this process began. Furthermore, according to this view, natural resources are likely to become even more important toward the end of the century, both in establishing a backstop price for the upward rise of land-based resources and also in assuring alternative sources to those upon which we are becoming increasingly dependent. From this perspective, the seabed mining provisions of the treaty reflect an inadequate vision in terms of defining our national security interests.

The critics admit the importance of naval forces, including the ability of our navy to project force overseas and pass freely through straits. Indeed, some believe these naval interests to be so strong that they question whether

*The Group of 77 is the major coalition of developing countries within the United Nations. Although there are now almost 120 members of the coalition, the group is still referred to by its original number.

the negotiated treaty language is sufficient (both legally and practically) to protect them. Other critics, however, argue that this aspect of our security interests has been exaggerated. First, there has been an increase in the range of our submarine capabilities over the decade. In addition, they argue that the Soviet Union is more dependent upon straits than we are and finally that not all the straits are of major importance. Moreover, the critics argue that there are better alternatives for protecting passage through straits than through signing an inadequate law of the sea treaty.

In the critics' view, we can take our stand on traditional international law and reinforce that with bilateral diplomacy in the cases of the few straits that really matter to us. In certain instances, it may be necessary to use force for those passages which might be contended, but a few discreet uses of force might be less costly in terms of establishing our basic security interests than either acceding to unacceptable interference with navigation or paying an excessive price to attempt to protect navigation by treaty.

Seabed Mining Issues

The major concern of most critics is with the seabed mining regime. In this respect they have two types of complaints. One is the specific practical economic effects of the regime and the other is its precedent in terms of international power distribution. In practical economic terms, the critics argue that the key to seabed mining is to provide assured access, security of tenure, and assurances of fair and commercial terms that can make massive billion-and-a-half-dollar per mine site investments feasible. An international licensing regime or similar minimal arrangement would be sufficient to assure this necessary condition for seabed mining. Moreover, it could do so without the establishment of a cumbersome international bureaucracy or uncertain political regulations. The American interest lies in a minimal framework to assure order to allow international seabed mining. On the other hand, right from the start, the Group of 77 has wanted a unitary international system in which the international community would both own and manage seabed mining. In the early stages of the conference, these differences created a stalemate until 1976 when then Secretary of State Kissinger suggested a compromise. He tried to split the difference between the two antithetical views by establishing a parallel system: private and state companies would be licensed to mine on one "side" of the system while the other side would consist of mine sites to be managed by an international authority.

This compromise was not sufficient for the 77, and they pressed the United States to make more concessions. In a sense, having split the difference once, the Group of 77 pressed us to split the difference again to establish not only the parallel systems, but also what they called "effective parallel systems." This meant that technology would have to be transferred and finance provided to make sure that the international authority would be ready and able to control the seabed mining system. In addition, would-be land-based producers of seabed minerals insisted upon production limits on seabed mining to protect against any reduction of their potential economic rents from mining. Secretary Kissinger agreed to these additional de-

mands subject to the proviso that the negotiated regime assure U.S. access to the mineral resources on commercial terms. The critics argue that this proviso has not been effectively met.

They suggest further that the prospects for seabed mining are not so good that we can afford to sign an inadequate treaty. As the London *Economist* put it, "prospects have never looked brighter for an international agreement on mining the seabed, after 12 years of waffle. Only one snag: the economic prospects of actually mining minerals from the sea could hardly appear more bleak. Mining executives say they will need a return on their investment of at least 30% to compensate for the risks involved, the sort of return that oil companies typically look for . . . The likely rate of return is nowhere near such levels—only about 8% . . . Big cost savings in a second generation of ocean mining technology may be the only answer, but that would push big seabed mining well into the next century."[6]

Common Heritage Principle

The critics also object to the seabed mining provisions in terms of the precedent that they set. In their view, many of the less developed countries are particularly interested in establishing a unitary international management system, or close approximation of it, for purposes of setting a precedent for the redistribution of global power. Essentially, this is the first practical negotiation of the ambiguous phrase "common heritage of mankind," and the more ideological of the less developed countries want to assure that a pattern is set which reinforces their claims and interests in the future.

In that sense, many of the provisions of the treaty for seabed mining can be seen as opposed to traditional U.S. ideology and practical market experience. Such measures as production controls, technology transfer on allegedly mandatory terms, an unwieldly international authority and a complex system of voting—with a one-nation-one-vote assembly and a one-nation-one-veto council—are precedents which the critics believe would serve us ill in the future. For example, the U.N. has negotiated a moon treaty which is now open for signature. The critics believe that the way the common heritage principle is implemented in the LOS conference (as opposed to open access and market principles) may ill serve us in the draft moon treaty and in future situations such as Antarctica or other areas claimed to be subject to "common heritage" treatment.

The critics argue that the draft treaty which has been produced by the Law of the Sea Conference is not a furtherance of international justice. In their view, open market exploitation of natural resources of the seabed—combined with a fair system of taxation and revenue sharing—would do far more to lower prices, benefit consumers, and aid development in all countries than the cumbersome procedure which has been developed in the treaty. They point to the irony that the richest countries have been the biggest gainers from the extension of coastal jurisdiction which essentially robbed the common heritage of the largest part of its most immediate meaning. Indeed, six of the top ten beneficiaries of the extended exclusive economic zone are developed countries and the single largest gainer in

these narrow terms is the United States. Nonetheless, the critics argue that it is more in our interest as well as in global interests to maintain market principles (with a system of international revenue sharing) as a way of exploiting ocean resources and making the benefits of efficient exploitation broadly available to all.

Thus, the critics conclude that the best policy for the United States at this point would be to unpackage the various components of the current text of a draft treaty and to separate the various issues that have been unnecessarily linked together by conference diplomacy. In their view, we would do far better to deal with some issues under the customary international law with a touch of force as necessary.

As for other issues, they believe the United States should try to develop partial treaties or minitreaties among sets of likeminded states.[7] In paticular, they see the evolution of comparable legislation—extending protection for preliminary mine site investment—as a means of evolving toward a set of minitreaties. This is not the stated intent of the current U.S. or German legislation which is only to be ad interim before the coming into force of the U.N. treaty, but the critics would prefer to build upon this formula as a way of establishing an alternative to the U.N. draft provisions for international seabed mining.

Formulating the Issues

Finally some of the critics attack the whole process by which the law of the sea draft treaty was negotiated. In their view, we should not have agreed to negotiate a principle such as common heritage of mankind in the U.N. context. Given the unwieldiness of U.N. procedures with bloc voting and large numbers of countries dealing with vaguely formulated issues, it was inevitable that this would become a slippery slope on which we would have to make compromises which fail to protect our true interests. Not only were we unable to keep issues separate, but we also had to give away far more than we needed to. In the view of the critics, we never thought through our long-term interests at a high level. Indeed by 1970, the die was cast when the Department of Defense, which had thought more in advance about its interests, was first off the mark. The national interest was narrowly defined in terms of straits transit by low level defense officials who failed to see the broader implication of issue linkage. By the time there was systematic high level review, it was already too late. Even then, across-the-board senior review tended to be cursory and irregular. From this view of history, the whole process of negotiating the law of the seas treaty has been a mistake and is a precedent which we should be sure never to follow again either in our domestic processes or the international negotiating arena. It was a mistake, say the critics, because we had a real alternative which was to rely upon customary law and the occasional use of force as a means of defending our navigational interests, while relying upon unilateral initiatives coordinated among like-minded states as a means of advancing our resource interests.

In Defense of the LOS Treaty

Needless to say, defenders of the draft treaty do not accept these criticisms. They object in both specific and in general terms. Specifically, the defenders point to the increased importance of our naval forces in the aftermath of the Soviet invasion of Afghanistan and the fall of the Shah of Iran as policeman of the Persian Gulf. Naval power has proven to be critical in the Indian Ocean area. The defenders point to the flexibility and visibility of the carriers and their ability to establish a presence without the political problem of land bases. As for the role of straits, they point out that with more than half the oil in world trade coming through the Strait of Hormuz, free transit deserves priority.

The defenders admit the charge that our interests have evolved over the course of the decade. At least, our perceptions of our interests have changed. Certainly in the mid 1970s, our perception and definition of our ocean interest was different than it seemed at the beginning or end of the decade. By 1976, the United States was among the countries leading the charge on extension of coastal jurisdiction over offshore resources. Because of the increased pressure from Japanese and Soviet fisheries off our coast, our agreement in the mid 1970s to a 200-mile exclusive fishing zone was no longer a concession with which we could have bought continued access for military vessels in other countries' exclusive economic zones, but was a response to American domestic politics. Without the larger context of the law of the sea negotiations in which more complex trade-offs could be arranged involving the seabeds, customary international law might have evolved toward a 200-mile territorial sea rather than the present draft formulation that permits free transit through straits and access of naval ships in the exclusive economic zones of other nations.

Perhaps the most eloquent of the defenders of the new draft treaty is Elliot Richardson who was Undersecretary of State when some of the critical decisions were made at the beginning of the decade and who in 1977 returned to the oceans issue as ambassador at large and special representative of the president for the Law of the Sea Conference. Richardson argues that there has been a revived awareness in the United States of the importance of global mobility. At the same time, more and more countries are acquiring military technology of patrol boats, land-based aircraft, and ship-to-shore cruise missiles which would allow them to effectively control extended territorial jurisdictions. Thus, unilateral naval initiatives could become more costly simply in military terms. Furthermore, Richardson points out the difficulty of maintaining a consistent unilateral policy and program to enforce our jurisdictional claims. Each embassy would constantly press to exceptions and priority to the preservation of cordial bilateral relations. In Richardson's words, "there is only one way to prevent the cost both of conflict and of inaction. It is to create a common understanding and a common acceptance of rules compatible with the routine global deployment of air and naval forces. This cannot be done, quite obviously, merely by invoking what we may generally believe to be superior legal arguments in support of our view of the prevailing principles of international law. It requires building a new concensus embracing the strategically significant coastal states."[8]

Richardson admits that the seabed provisions of the draft treaty are a compromise which achieves less than our optimal position if we did not have to engage in compromise. But he argues that the parallel system of both companies and international seabed mining under the enterprise, with overall supervision by the international seabed authority (in which we have a degree of control through weighted voting), provides sufficient grounds for international seabed mining. He dismisses the idea of minitreaties for seabed mining on the grounds that "in the real world . . . this is simply not the way in which things are likely to work out. The changes in customary international law that have gained the most momentum from concensus in the Law of the Seas Conference are those that enlarge coastal state claims. While these expansive principles may not need the treaty's entry into force in order to be ultimately absorbed into customary international law, the same cannot be so confidently said of the limitation and qualifications on coastal states' rights that the treaty would attach to them. The provisions for transit passage through straits qualify the extension of the territorial sea; the provisions for sea lanes through Archipelagos limit the concept of the Archipelagic waters; the provisions preserving high seas' freedom in the exclusive economic zone, restrain coastal state claims of control; the provisions for geographic limits bar claims beyond those limits. These provisions can spell the difference between enjoying and losing high seas freedom of navigation, overflight and related uses in 40 percent of the world's oceans." In short, says Richardson, "any treaty that can win widespread acceptance is bound to have costs as well as benefits. Its measure is not whether it is as good as the constitution for ocean space we would write if we alone were responsible for its terms. Its measure is whether it serves all our interests as well as or better than those interests would be served in a treatyless world."[9]

At a more general level, Richardson argues that there was a greater inevitability about the process of negotiating the law of the sea than the critics admit. In Richardson's view, there were few real alternatives, and we got about as much out of the process as we could expect to get out of it given the overall role of the United States in the world and the nature of world politics today. Richardson argues against the conception of those who believe that we need a more nationalist conception of our foreign policy and that our view of the world and of America's role in it has been far too internationalist. He admits that the American people in their current mood seem to want rather more Theodore Roosevelt and less Woodrow Wilson in our foreign policy, but he argues that "our global situation demands a broader, not a narrower international perspective in the formulation and the conduct of U.S. policy."[10] In Richardson's view, the political effectiveness of both military and economic power is diminishing. Consequently, autonomy and self-sufficiency have to make room for interdependence. Realism requires "that we face up to the implications of change, grasp them firmly, and think them through. We shall then see that the decline in our

ability to act autonomously has increased the necessity for strong dependable bonds of friendship and cooperation with other nations . . . The significance for our national interest of global institutions will also become apparent."[11]

In short, as we look carefully at the debate between the critics and the defenders of the draft treaty text of the law of the seas, we find that it raises questions which go far beyond the oceans and go to the heart of the U.S. position in world politics today and in the future. It is to that broader question that I now turn.

The Decline of American Power?

The foreign policy mood of Americans in recent years has reflected a concern over the decline of American power in world politics. The mood was well captured by the cover of the journal *Business Week* immediately following the fall of the Shah of Iran early in 1979. The cover portrayed the Statue of Liberty with a tear rolling out of its eye and presented a caption, "The New Debate Over Guns and Butter."

To what extent has there been a decline of American power? In simple aggregate terms, the answer is relatively clear. Using such simple measures as share of total world defense expenditures or share of total gross world product, the United States accounted for roughly a third of the world total on each measure at the beginning of 1950.[12] Our responses to the Korean and Vietnam wars sharply increased our share of military expenditure, but today the United States accounts for a little less than a quarter of the world total on each measure. But one should be careful about drawing conclusions from simple aggregate measures. Power is a relational concept, and it depends on the action of others as well as ourselves. Even more important, we must be clear about what we think are the causes of the changes in the American power position in the world, for if we mistake the causes, we may apply inappropriate remedies.

To help clarify the causes of the changed American position in the world, I will distinguish between the short-run reversible and the long-term irreversible causes. Three major short-term changes contributed to the changed American power position in the decade of the 1970s. The first was our self-limiting attitudes in the aftermath of Vietnam. A second relates to the military growth of our key adversary, the Soviet Union. The third was our growing dependence on imported oil which contributed both to our economic problems and our political vulnerability. I will deal with each in turn.

The Vietnam Aftermath

American foreign policy always has been characterized by cycles of inward-turning attitudes and outward-turning attitudes. Political scientist, Frank Klingberg, identified such cycles in an article published in 1952.[13] What's more, he predicted that on a roughly two-decade phase, there should be an inward-turning set of attitudes sometime in the late 1960s. And indeed, after our involvement in Vietnam, those inward-turning attitudes did come to dominate our foreign policy.

What is surprising, however, is that they did not persist very long, certainly not as long as a two-decade phase would lead one to expect. Neo-isolationism did not turn out to be a strong phenomenon. One need only compare the foreign policy attitudes expressed in the presidential campaign of 1976 with the foreign policy attitudes prevalent in the election campaign of 1980 to remark how strikingly U.S. foreign policy attitudes changed in the latter half of the 1970s.

Furthermore, it is interesting to note that the changes had begun even before the fall of the Shah or the Soviet invasion of Afghanistan. By 1978,

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support for defense spending was at an 18-year high. Congressional movements such as the Mansfield amendment to withdraw troops from Europe had been replaced by congressional pressure to strengthen our position in NATO. Public opinion polls showed increased support for use of the Central Intelligence Agency to support pro-American governments abroad.

It is not entirely clear why the inward-turning phase of the cycle proved to be so short. Perhaps in an age when most Americans receive their news from television rather than from newspapers, attitudes are more volatile. Perhaps political generations have shortened. The phases in the Klingberg cycle may have reflected each generation reacting against the "mistakes" of its parents, and if political generations are shortened, there may be a more rapid swing beteen phases.

Whatever the merits of such speculation, the shortness of the inward-turning phase also reflects the reality of the outside world, in terms of both our increased interdependence and the behavior of the Soviet Union. Increased dependence on exports and imports, the increased effect of international events on the value of the dollar, and issues, such as Persian Gulf oil, all indicate to the American public that neo-isolationism is not a real option. Moreover, the behavior of the Soviet Union, the other nuclear superpower with the capability of destroying us, reminds Americans that there is military interdependence as well. This is the second short-term cause of the changing American power position.

Soviet Military Strength

Over the past decades, Soviet military capabilities have improved to a point where previous American military superiority has now been replaced by a condition of rough parity in the military balance. Depending on the method of measurement, whether in dollars or rubles, the CIA estimates that Soviet defense spending exceeds American defense spending by some 30–50 percent. While there are methodological difficulties in calculating exact comparisons of defense spending across different currencies and different socio-economic systems, nonetheless the trend lines are clear. Since the mid-1960s, the Soviets have been increasing their defense spending from 3 to 5 percent a year. Any simple knowledge of compound interest rates would indicate this rate of expenditure is likely to have a strong effect over a decade and a half. Moreover, the effects have become apparent in specific areas. For example, the Soviets' originally inaccurate large missiles have gradually become accurate enough over the past decade and a half so that a number of observers believe these missiles can threaten a significant part of at least our land-based ICBM force. While a first strike scenario is not particularly credible, a number of observers draw political conclusions from the changed balance of nuclear capabilities and such perceptions affect power.

The Soviet Union also has increased greatly its capacity to project military force beyond its borders to distant parts of the globe. Although Soviet capability is still less than ours, it is a capability which the Soviets lacked in the 1960s. Finally, the Soviets have been able to increase their military position in the European theater, particularly in terms of the theater nuclear

balance. This situation has caused concern among some of our European allies who fear that if the United States no longer dominates the ladder of escalation, it cannot credibly extend the protection of its strategic nuclear deterrent forces.

A number of steps have been taken to redress these perceived differences in the military balance. For example, NATO governments have agreed to a sustained real increase in defense spending. In December 1979, they agreed to position theater nuclear forces (cruise missiles and intermediate range ballistic missiles) in Europe to improve the theater nuclear balance. The United States has also taken steps to develop accurate new weapons such as the MX intercontinental missile and the air-launched cruise missile. In the conventional area, the United States is creating a rapid deployment task force to project conventional capabilities to distant areas more rapidly and more effectively than in the past. And despite fiscal stringency, the defense budget will increase.

It is interesting that most of these measures actually antedated the Russian invasion of Afghanistan. While these measures take time to implement, there is good reason to believe that the perceived changes in the military balance may well be remedied by the middle or latter part of this decade. Indeed, if anything, there is a danger of Americans failing to see the military balance with the Soviet Union in a larger political perspective. The United States still produces twice the gross national product of the Soviet Union. It has an ideology which is far more attractive to most of the world than is the now tired ideology of Soviet communism. In technology, we hold a significant advantage in many areas. In terms of alliances our alliance with Europe and Japan, and our improved relations with China put us in a far better position than the Soviet Union. There is reason to believe that Soviet decision makers survey what they term the "correlation of forces" in larger than military terms and see a decade in which the balance may weigh against them.

Dependence Upon Imported Oil

The third change that occurred over the course of the 1970s was the great increase in American dependence upon imported oil. Ten years ago, the United States imported 3.5 million barrels of oil a day (mbd), or about a quarter of our needs, at roughly $2 per barrel. We were the world's largest producer (at 11.3 mbd). (Just three years earlier, our surplus capacity had allowed us to defeat easily an Arab oil embargo triggered by the 1967 June War.) By the end of the decade we were importing 8.5 mbd, or nearly half our needs, at 15 times the 1970 price, and our home production was declining. Unfortunately, the painful experience of the 1973 Arab oil embargo did not save us from repeating mistakes when the Iranian Revolution curtailed production in 1979, and the president called the situation a "clear and present danger to our national security."

Today, nearly two-fifths of the total oil consumed in the free world economy comes from the Persian Gulf, one of the world's most politically unstable areas, and is vulnerable to terrorism, accident, warfare, and extortion. The sudden loss of Persian Gulf oil for a year could stagger the world's

economy as did the depression of the 1930s. A Department of Energy study estimates that the annual losses of 3, 10, and 20 mbd (which correspond roughly to the annual loss of production from Iraq, Saudi Arabia, or the entire Persian Gulf) could cost the U.S. economy $84 billion, $323 billion, and $686 billion respectively.[14] The costs to our allies would be even greater.

The potential foreign policy costs are also large. Energy security problems inject a new type of tension into our allies. The source of threat lies not in Europe nor in East Asia, but in the Middle East, outside the scope of the formal alliance frameworks. Our allies are more vulnerable than are we. The necessary policy responses go beyond military measures; they involve the conflict-filled areas of domestic economic and energy policies where coordination is particularly difficult for democracies. There is a real danger of disarray in a crisis, as well as divergence in the efforts to avoid crisis. Indeed, different energy vulnerabilities among the Western nations present better opportunities to disrupt Western alliances than do direct military threats for the Soviets or others.

Looking back at American policies for energy security in the 1970s, one is struck by two strong ironies. First, we talked about energy security, but some of our policies, such as domestic price controls that subsidized oil imports, actually made us more insecure. Second, the United States acted as though government controls at home and market forces abroad would solve U.S. energy security problems when the opposite was closer to the truth. That view failed to recognize the realities of changing world politics, particularly decolonization and Britain's withdrawal from the Persian Gulf which helped to erode the international regime that had previously governed oil transactions.

Painful though it was, we learned some useful lessons from the interruption of Iranian supply. In April 1979, we began the gradual decontrol of domestic oil prices that has now ended the subsidization of imports. We also learned the folly of putting too many eggs in the Persian Gulf basket, and the Tokyo Summit in June 1979 began a process of consumer government agreements to set ceilings on imports. Finally, the shock of the Shah's fall plus the Soviet invasion of Afghanistan led to steps to repair our military posture in the area.

There is still a long way to go. Even with decontrol, oil industry sources project declines in domestic oil production levels during the 1980s, and that the U.S. will be hard pressed to meet its goal of cutting imports in half by 1990. More important will be the steps to reduce our vulnerability by building public and private reserves of oil and gas to give us surge capacity in a time of emergency. A successful strategy will have to focus on deterring and preventing interruptions and alleviating their damage in the short term while reducing our vulnerability over the decade. This will require a better integration of political-military policy, domestic energy policy, and international energy policy than we have achieved at home or in our alliance relations in the past. Nevertheless, the right policies can decrease greatly our degree of vulnerability over the course of the 1980s.

Historical Perspective

Even if the three major short-term causes of the relative decline of American power seem on their way to being overcome in the 1980s, our problems are not solved. The danger of focusing only on these short-term reversible causes is that it may mislead us about the remedies that are appropriate to the long-term American power position in the world. Increased military expenditure makes sense in terms of redressing the military deficits of the past and the excesses of the brief post-Vietnam era, but we would be mistaken to think that this is going to bring us back to the position that the United States held in world politics in the 1950s. Two longer term causes of the relative change in American power are not likely to be reversed in this century.

THE POSTWAR PERIOD. The first of these causes is simply the anomolous nature of the immediate postwar period when the American economy and dollar were so predominant. The third quarter of the twentieth century was a very odd period. Essentially, the United States emerged from World War II as the strongest power in a world destroyed. Yet our economy and our military position had been enhanced by the war rather than suffering destruction as had those of all the other prewar great powers. Hence, the American hegemonic position in the third quarter of the twentieth century was a bit like that of the boy on the block who awoke one morning to find that everybody else had been laid low by the flu and he had become the dominant kid on the block. It is only natural that this situation would change as others regained their health. Indeed, it is to the credit of U.S. foreign policy that we helped to accelerate this recovery. The key component of our postwar foreign policy has been the restoration of economic prosperity and political stability in both Europe and Japan and our close alliance with those countries.

Thus the fashionable European concerns of the 1960s over the "technology gap" and the "Défi Americain" of U.S. investment were bound to be self-curing. Conversely, without belittling the problems of inflation and productivity, the current projections of American economic decline are exaggerated by the artificial base period. As we look at the relative decline of the U.S. share of gross world product, the largest part of the share that we lost was not represented by a gain for the Soviet Union, but by the recovery of Germany and Japan. That was our deliberate foreign policy goal and a wise one. In that sense, nostalgia for our preponderant economic position of the 1950s is bound to be disappointed.

INCREASING COMPLEXITY OF WORLD POLITICS. The other long-term cause of our changed position in the world is the increase in the complexity of world politics and the reduced potential for any country to exercise power over the whole system. There are more states, more issues, and less hierarchy in international politics. For example, there are three times as many states in the United Nations today as at the time of its founding in 1945. Moreover, our foreign policy agenda has become more complex. Added to the classic issues of military security and international trade are issues such as food, population, environmental destruction, the governance of space, climate modification, terrorism, and a whole host of others.

Finally, there has been a change in the role of military force in world politics. In general, force has become more costly for great powers, particularly democratic ones, to apply effectively in world politics. This is an issue which is frequently misunderstood. It was fashionable in the mid-1970s, in the aftermath of Vietnam, to argue that force had lost its effectiveness. This was clearly not the case, then or now. Force remains the most effective form of power in many issues and in many situations. But it also may prove to be the most costly form of power. Indeed in some circumstances force is too costly to be applied to achieve certain goals. While the military balance of power remains the bedrock or necessary condition of a sound policy, military force is difficult to apply to many of the new interdependence issues on our foreign policy agenda.

The use of force is made more costly for major states by four conditions: risk of nuclear escalation; uncertain and possible negative effects on the achievement of other goals; resistance by socially awakened nationalistic populations in otherwise weak states; and domestic concern in democracies about the moral cost of the use of force. Even states such as the communist countries, relatively unaffected by the fourth condition, feel some constraints from the first three. For example, the invasion of Afghanistan may prove effective, but it also seems to have been more costly in terms of the second and third conditions than the Soviet Union initially expected. On the other hand, given modern technologies, lesser states involved in regional rivalries and terrorist groups may find it easier to use force. The net effect of these changes in the role of force is to erode somewhat international hierarchy which traditionally has been based upon military power.

This erosion of international hierarchy is sometimes portrayed as a decline of American power as though the causes lay in our own internal processes. Admittedly, from the perspective of a policy maker of the 1950s, there has been some decline, but as we have seen, American power in the sense of resources has not declined as dramatically as is often supposed. Representing nearly one quarter of world military expenditure and world economic product, the United States is still the most powerful state in the world.

To understand what has changed in the world, we must distinguish power over others from power over outcomes. What we are experiencing is not so much an erosion of our power resources as exercised against any single country (although there has been some) but an erosion of our power to control outcomes in the international system as a whole. The main reason is that this system itself has become more complex with the addition of more issues, more actors, and the erosion of hierarchy. We still have leverage over others, but we have far less leverage over the whole system. We are less well placed to extract unilaterally the positions which we prefer. Increased military spending will not be sufficient to solve this problem. In such a world, multilateral diplomacy and international institutions become more important because so much of the agenda is concerned with organizing collective actions. In short, while increased military budgets can help to remedy some aspects of our current international position, we cannot hope to simply spend ourself out of this long-term trend of increased complexity of world politics.

One must be careful, of course, not to overstate the degree of change in world politics. In a world of sovereign states, military force will always remain a necessary condition for stability. In 1977, Robert Keohane of Stanford University and I published a book, *Power and Interdependence*, which argued the necessity of distilling and blending the wisdom from the modernist and the traditionalist views of international politics and developing a coherent theoretical framework for the analysis of interdependence as an aspect of international power.[15] We cautioned against the tendency to establish a false dichotomy between theories of interdependence and traditional realist theories of military power. We pointed out that asymmetrical interdependence is also an important source of power in the international system. We developed models of power based on different forms of interdependence including a model that extended classical realist analysis by adopting it for application to interdependence issues.

While the overall response to our work has been heartening, some critics have taken us to task for having "grossly expanded the scope of realist theory." In their view, "realism is not an appropriate theoretical perspective for analyzing issues stemming from interdependence as realists themselves would readily admit." But that is exactly one of the problems which Keohane and I were trying to resolve. As long as analysts insist on a false dichotomy beteen realism and economic interdependence, policy prescriptions will oscillate between an over- and an under-reliance on the role of force rather than the relevant task of integrating force with other policy instruments into an effective strategy. As the same critic concedes, "*Power and Interdependence* has punctured the simplistic notion by showing the ubiquity of politics across the whole range of international issues."[16]

We cannot understand the outcome of the law of the sea negotiating process unless we understand the changes that have occurred in the role of force and the complexity of world politics and the wielding of instruments of power in the kind of world in which we now live. Traditionalists find it anomalous that the world's greatest naval power in the postwar era was unable to impose its will upon its allies in an area where it was allegedly a regional hegemon, i.e., Latin America, or that Great Britain would lose a cod war with a weak state like Iceland.

As the politics of rule-making in the oceans have evolved in the postwar period, naval force played a role but only after passing through the distorting prism of international organizations. Prescriptions which urge returning solely to the use of force fail to understand the broader changes that have made those international organizations a significant part of international politics. The multiplicity of goals of the superpowers, the development of multiple channels of contact in an era of modern communications and transportation, as well as the increased costliness of the use of force, help to explain why the alternatives to the current law of the sea process were more limited than some of the critics admit.

On the other hand, it does not follow from our experience with the law of the sea political process, that we should never use force or that we should blindly pursue establishment of regimes in the context of megaconferences.

Our alternatives are not that limited. While we have an interest in regimes, there are a variety of options as to how we might pursue that interest.

The United States is the leading state in an era when there can only be leadership without hegemony, in contrast to the 1950s. Yet, we can still take unilateral initiatives, particularly if they are designed to help move others in the direction of multiple leadership rather than accept situations of inertia. Leadership by example often will be important. But overall, there will have to be a higher degree of coordination of our position with that of other states than was true for Great Britain in the nineteenth century or for the United States in the extraordinary period immediately following the end of World War II.

To illustrate these considerations, I will turn next to two important areas of current concern and significance for our national security. First I will discuss the problems relating to oil and security and the breakdown of the international oil regime. Then I will discuss problems of the regime for non-proliferation of nuclear weaponry and illustrate some of the difficulties and possibilities of maintaining the regime in that area including the role of conference diplomacy. Finally, I will draw conclusions for American policy from the comparison of our experience with international regimes in the oil, proliferation, and ocean issues.

The Collapse of the International Oil Regime

In 1970, world oil was still governed by and large by a loose international regime that might be termed "guided laissez-faire." It had two essential components. First, price and production decisions were largely made by major international oil companies for essentially their own commercial reasons. Second, the major powers (particularly the United States and Great Britain) occasionally intervened diplomatically to guarantee access for companies and generally oversee the process. With a few exceptions, these governing arrangements were stable and generally accepted. There seemed to be no real alternative.

One result of the regime was that oil prices and production levels tended to reflect supply and demand conditions in major consumer countries rather than the expected long-term scarcity value or political considerations in producing countries. As low cost Middle East oil became more plentiful in the postwar period, most of the difference in value between its low cost of production and the high cost of alternative sources of energy went to consumers who enjoyed low and declining oil prices.

A second result of the regime was that United States (and other countries') energy security policy could maintain a low profile. Basically, supply was assured by efficient operations of the companies under a *Pax Americana* that involved only an occasional diplomatic assurance of access, or antitrust measures to ensure a modicum of effective competition.

The changes in the regime by the end of the 1970s were dramatic. Prices and production levels were being set by producer governments rather than international companies, and for political as well as commercial motives. Such decisions were difficult to predict and did not follow a stable or recognizable set of international rules. Producer rather than consumer countries were capturing a large part of the difference between the low costs of production and the higher costs of alternative replacements for Middle East oil. The companies were increasingly constrained by governments at both ends of their pipelines, and their assured access to crude oil under predictable long-term contracts diminished. Moreover, guarantees of access and oversight of price and production decisions had become widely regarded as absolute sovereign prerogatives of producer governments rather than of the Western powers.

Why did such a remarkable change occur over the course of a decade? Basically because of longer term trends in the underlying structure of power, both in general political-military terms as well as in the oil area itself. In the general political structure, Western dominance of the producing countries declined with decolonization. In 1960, 6 of the 13 present OPEC members were colonies or protectorates, and the key straits of Hormuz, Aden, and Malacca were under European control. The rise of nationalism in the producer countries also made any Western intervention more controversial and more costly—witness the events in Iran in 1953 compared with those of 1979.

More specifically, a turning point occurred with the British withdrawal of its military presence from the Persian Gulf in 1971. At the same time, the Vietnam War ensured that the United States would neither replace the British as it had in the eastern Mediterranean in 1947 nor fully counter the increasing military capabilities of the Soviet Union. Instead, the United States sought to fill the power vacuum in the Gulf by building up the Shah of Iran as the local leviathan.

In addition to these general political changes, there were important changes in the structure of power in the oil issue area. A key turning point was the diminished American surplus after 1971, when our production peaked and our dependence on imports began to increase. The United States lost the spare capacity that it had called upon to supply its allies in the face of political interruptions at the time of the Suez Crisis in 1956 and the June War in 1967. The power to balance the market in a time of crisis passed from the United States to OPEC nations, particularly Saudi Arabia.

A second important change was in the relative power of the companies and the producer governments. Consistent with long-standing patterns in the relations between multinational corporations and less developed countries, original bargains became obsolete and contracts "renegotiable" as the host countries gradually developed their indigenous capabilities. This trend was accelerated by the 1950s and the 1960s. Eager to gain access to crude oil, their competition with the established majors increased the options and enhanced the bargaining power of the producer country governments.

Initially, the increased production by the new entrants had the effect of forcing the price of oil down, and producer governments tried to maintain revenue levels by increasing production. Ironically, in 1959, the United States reacted to the falling prices by imposing protectionist quotas that exacerbated the glut in world markets; increased the resentment of producer governments; and contributed to the creation of OPEC. (But it was not until the oil market tightened for other reasons that OPEC proved effective in raising prices.)

Catalysts for Change

Chronologically, the changes in the 1970s occurred in three major steps, with political events serving as catalysts in the political-economy education of the producer countries.

At the beginning of the decade, the closing of the Suez Canal and destruction of a pipeline had tightened the tanker situation. This allowed the new revolutionary regime in Libya to capitalize on its geographical location and the weak position of the independent companies to extract a price increase. This in turn triggered a similar demand upon the majors by the Persian Gulf producers. Eager for political harmony, the U.S. government sent a representative but did not support the companies in the critical meeting at Teheran in 1971. Essentially, the Middle East producers learned they could press the companies with threats of nationalization and shutdown without incurring serious penalties from the Western powers.

The second step was larger. In the context of the U.S. resupply of Israel in the October 1973 Arab-Israeli war, the Arab producers instituted a 25

percent cutback in production. Even before the cutback, the OPEC governments had decided on a 70 percent price increase that reflected tightening markets as U.S. imports increased. But the embargo created a scarcity and panic in world markets which drove prices for marginal quantities to extraordinary levels and allowed Iran to lead the other OPEC states in a 400 percent increase over prewar prices. Essentially the political catalyst of the war taught the producers the value of cutbacks and indicated that the long-run price of oil might be much higher than they had expected.

This lesson was reinforced by the third step—the Iranian Revolution in 1979— which showed that even uncoordinated curtailments can have large effects on price. In addition, the experience of the Shah led some producers to conclude that production cutbacks sometimes make domestic political as well as economic sense. The result was that control over prices, production, and, to an increasing extent, distribution channels largely passed to OPEC countries.

In summary, the loose regime that governed oil broke down in the 1970s for a complex series of reasons related to shifts of power and catalytic political events, not because of the formation of OPEC or market forces alone. The prospect of recreating a regime more satisfactory to us remains questionable so long as the structure of overall power and market power in oil remain as unfavorable to consumers as they now appear and as long as internal politics in key producer countries are unstable or unclear. The result is a world of political uncertainty with unpredictable prices; renegotiable contracts; and the lurking threat of disruptive interruptions.

Two Courses for Action

Two contrasting responses have been suggested to this breakdown of the international oil regime. Some thinkers in the traditional realist mode have suggested the use of military force. In their view, it is intolerable for the world's most powerful nation to be hostage to oil production decisions made by some of the world's otherwise weakest nations. They argue that the global (and national) costs of continued acquiescence to cartel price rises are so high as to merit a change in our frame of reference and to justify military intervention and "internationalization" of Persian Gulf oil resources.

The political and economic costs of such a remedy, however, are likely to be extremely high. First, the risk of destroying the oil infrastructure through fighting or sabotage could create a major disruption which could cost us and our allies hundreds of billions of dollars. Second, there is little prospect for developing broad international legitimacy for what would be characterized as a new colonial occupation, with resultant disruptions of our foreign policy elsewhere. Third, unless the situation approached what Kissinger termed "strangulation," it is uncertain how much public support would be maintained for such an occupation, particularly if less questionable alternatives such as demand restraint were not implemented first. How many lives spent are worth how many minutes in gasoline lines saved?

While this option is not a promising policy under foreseeable circumstances, it does call attention to more modest components of military policy

in oil strategy. An enhanced defense posture in the Middle East is a good energy investment. Our ability to deter Soviet intervention and to help protect quickly those who ask for our assistance provide important assets in the complex diplomacy of oil. But the traditional realists fail to see that force is not a sufficient strategy to respond to the collapse of the regime.

An opposite approach to the breakdown of the international oil regime calls for global negotiations to establish a new regime. The Report of the Independent Commission on International Development Issues under the chairmanship of Willy Brandt has urged immediate steps toward an international energy strategy as part of an emergency program of negotiations on North-South issues. In the commission's words, "the need to seek an international accommodation has been recognized since the oil crisis of 1973. Before the Conference on International Economic Cooperation (CIEC) in 1975-7, industrial countries wanted to concentrate first on oil and energy while the OPEC nations insisted on giving equal emphasis to the totality of the North-South dialogue . . . The differences in perception should not conceal the important areas of common interest and potential agreement between producers and consumers and the need for continuing dialogue."[17]

It is not too difficult to imagine a smooth long-term transition from cheap oil to more expensive energy alternatives that would benefit both consumers and producers. Given the long lead times for alternatives and the opportunities for price gouging in conditions of political uncertainty, the mid-term (1980s) real price of oil may be pushed higher than the long-term price. This could reduce long-term producer revenues; create uncertainty for their development planning; and by destabilizing the world economy, threaten the value of their new investments. Politically, a stable world economy enhances the security of producers who depend on an unprovoked and reliable West. It also reduces the economic sources of political instability in the oil-importing, developing countries. A consumer-producer dialogue might help nations to shift their focus to these potential long-term joint gains.

Such a dialogue might seek intergovernmental agreements to stabilize the oil market. For example, consumer and producer would agree on production targets and consumption limits which would allow for modest real price rises over the decade. OPEC countries would agree to maintain sufficient spare capacity to increase production if a shortfall of production from any subgroup of producers threatened to push prices outside an agreed band. They would cut production (or permit consumers to increase demand above the agreed limits) if prices threatened to fall through the bottom of the band. Additional inducements might be added such as indexing of assets and assurances of assistance and market access for the new OPEC industries. Special credit or aid provisions might be agreed upon for oil-importing, developing countries.

While it is not difficult to imagine such a formula, it is difficult to imagine such negotiations creating a stable regime under current political conditions. Unless we can answer some hard questions in advance, we should be cautious about embarking on such a course. No one can object to dialogues that produce stable and balanced regimes. But will they? First,

could we keep the agenda focused on energy? Given the politics of the Middle East and the strong bargaining position of the producers, we might find ourselves unable to keep certain awkward political issues off the table. If other developing countries participate, we may find ourselves replaying sterile North-South debates, but with much higher stakes than in the United Nations. We need to be sure we can control the Pandora's box effect before we start down the path to serious international collective bargaining.

Is a reasonable bargain likely? At modest prices, economic interests diverge among OPEC surplus producers who lean toward conservation and high absorbers interested in maximizing revenues. Large price increases (which maximize revenues and allow painless production cutbacks) tend to reconcile that division. Would OPEC countries be able to agree to a bargain that meant higher production and lower prices than the market would otherwise determine? Or would the process of collective bargaining help OPEC to pull its act together, but at a higher price? Given the weak bargaining position of the consumers, they would be poorly placed to bring down that price.

Does OPEC have sufficient cohesion to make a bargain stick? Thus far OPEC countries have been unwilling to limit their separate sovereign control over production decisions concerning the resources that are there major source of power. They compete for power within the oil arena and they reserve the right to use oil as a weapon in wider political games. Given the politics of oil, and the domestic instability of many OPEC governments, how credible is an OPEC promise to increase production if a shortfall has political ramifications? Are we not likely to pay higher than necessary prices under normal conditions only to reap broken promises on the occasion of future disruptions?

Would the benefits exceed the costs? Basically consumers would gain a formal framework for debating production (and price) decisions that are now entirely in OPEC hands (except insofar as bilateral diplomacy has an effect). What is it worth paying for such a framework? OPEC cohesion for collective bargaining may be achieved at higher prices than would otherwise be the case. Special instruments such as indexing may prove very costly, particularly if the precedent spreads. Add the risks outlined above, and the benefits of a formal collective bargaining framework look slimmer than the costs.

This is not to argue that conversations with producer states are not useful, or that restoration of an international regime is not a worthy goal. Various bilateral and multilateral discussions are essential and there are steps we can take to pave the way for possible negotiations later. But the time is not ripe for fruitful collective bargaining when power is so imbalanced. Conference diplomacy under current circumstances is unlikely to be fruitful unless it is part of a larger strategy to enhance our energy security. We must get our own house in order rather than embark on an energy equivalent of the Law of the Sea Conference. In other words, there are some situations where we are better off living for a while with the absence of a regime, uncomfortable though that may be, rather than plunging into an open-ended set of negotiations which may have unintended and unpleasant consequences.

This does not mean that we should do nothing. I have suggested various measures elsewhere.[18] But we must not divert our attention to spurious international quick fixes rather than focusing on the hard work of integrating domestic economic and international policy instruments into a realistic energy policy. Only as we deal ourselves a hand with better cards in it can we recreate an equitable international regime for international energy issues. Whether such a regime can be recreated is an open question. Certainly, there is a long-run common interest, and ideally one can think of collective energy security as a worthy goal. But we do not now have the structure of power and control of political issues that would make possible the recreation of a stable and equitable international oil regime.

Maintaining a Non-proliferation Regime

Non-proliferation of nuclear weapons provides an interesting contrast with oil. In this case, the problem has been to maintain an existing but threatened regime.

It has been said that the ultimate success of a national policy comes when a country is able to elevate its interest to the level of a general principle. In that sense, American non-proliferation policy over the years has been surprisingly successful. The United States has helped to foster an international regime which establishes a general presumption against proliferation.

Regimes are seldom perfect. They vary in coherence and degree of adherence. We measure their existence in the acceptance of normative influence and constraints on international behavior. For non-proliferation, the main regime norms and practices are found in the Non-Proliferation Treaty (NPT) and its regional counterparts like the Treaty of Tlatelolco; the safeguards, rules and procedures of the International Atomic Energy Agency (IAEA), as well as in various U.N. resolutions. While there are a few important exceptions, the large majority of states adhere to at least part of this set of norms.

The beginnings of the current non-proliferation regime date from December 1953, when President Eisenhower launched the "Atoms for Peace" program. The idea of the Atoms for Peace approach was to assist countries in their development of nuclear energy for civilian uses, in return for guarantees they would use such assistance only for peaceful purposes.

The policy was oversold and poorly thought through in its execution at a time when too little was known about the pace and cost of peaceful nuclear development. But the concept did serve to create an initial consensus on which to build. Essentially, the most powerful state in the nuclear issue area used its power in a way that attracted others to a normative framework.

Specifically, the central accomplishment of the Atoms for Peace program was the creation of a system of international safeguards and an institutional framework in the form of the International Atomic Energy Agency, established in Vienna in 1957. Under the IAEA safeguards system, non-nuclear weapons countries agree to file with the Agency regular detailed reports on nuclear civilian activities. The countries also agree to allow international inspectors to visit their nuclear facilities to verify their reports and to ensure that there is no diversion of materials from civilian to military purposes. The safeguards system is central to the basic bargain of the international regime in which countries are assisted in their peaceful nuclear energy needs in return for accepting the intrusion of safeguards and inspection.

Non-Proliferation Treaty of 1968

The regime was further developed by the signature of the Non-Proliferation Treaty in 1968.

Eight significant states have refused to sign the NPT, usually on the grounds that it is a discriminatory treaty. But of the eight, France has indicated it would not undercut the purposes of the treaty, and in Latin America, a regional treaty limiting nuclear weapons helps to fill the normative gap. Skeptics have dismissed the treaty as a modern equivalent of the Kellogg-Briand pact since any state can quit on 3 months' notice. Other detractors have argued that the treaty is imperfectly drafted and involves promises that cannot be kept fully. Nonetheless, by establishing a normative presumption against proliferation and by creating procedures for verifying intentions, the NPT has helped to build confidence and a degree of predictability in states' behavior. Like its regional counterparts, such as the Treaty of Tlatelolco, the NPT helps to strengthen the international regime by symbolizing a common interest. The NPT is not, as some enthusiasts tended to believe in the 1960s, sufficient or the same as the international nuclear regime; but with 111 adherents, it has certainly become a central part of the regime.

Threats to Stability

By the early 1970s, there was a degree of complacency about the nonproliferation regime. Such complacency was shattered, however, by three events in 1974 and 1975. One was the Indian explosion of a "peaceful" nuclear device using plutonium derived from a Canadian-supplied research reactor with U.S.-supplied heavy water. The second event was the oil embargo and fourfold increase in oil prices which created widespread insecurity in energy supply and exaggerated expectations about the importance of nuclear energy. The net effect was to accelerate governments' plans for early commercial use of plutonium fuel, which unlike the low enriched uranium currently used as fuel in most reactors, is a weapons-usable material. The IAEA projected that some 40 countries might be using plutonium fuels by the end of the 1980s. At the same time, safeguards and institutions for dealing with such a flood of weapons-usable materials had not been adequately developed.

The third set of events that shook the regime in the mid-1970s was the proposed sale of facilities for producing weapons-usable materials without regard to their economic justification or proliferation implications. Subsequently, it was disclosed in at least two cases that the recipients were attempting to develop a nuclear weapon and there would almost certainly have been violations or abrogation of safeguards. In such circumstances there has been grave danger the international regime would collapse.

The threats to stability were reinforced by trends in the power positions of the United States inside and outside the nuclear issue area. Outside the nuclear issue, the United States suffered its disastrous defeat in Vietnam with an accompanying turn in its cycle of foreign policy attitudes. Inside the nuclear issue area, America's share of the world nuclear exports began to decline as strong industrial competition for the sale of light water reactors

developed in Europe—as might have been expected. Equally important was the erosion of the American leverage over nuclear fuel supplies.

The years 1976 and 1977 saw a series of American initiatives in response to the fuel cycle events that threatened the regime. First, the Nuclear Suppliers Group was established in London to prevent commercial competition from undercutting safeguards obligations. Second, in October 1976, President Ford announced a more cautious policy toward the use of plutonium in the U.S. nuclear program. Thus, some of the main lines of response later identified with the Carter administration actually preceded it.

However necessary, these steps and some of the initial steps of the new administration created international rancor. Yet maintaining and refurbishing the international regime would require a general approach around which a broad group of nations could rally. The process of rethinking the conditions of the regime had to be shared beyond the United States alone. A confrontational approach threatened to isolate the United States and further disrupt the regime.

An approach was needed that would reinforce the existing regime, yet halt the erosion of the status quo. It was important to shake others to attention and into action to refurbish the regime, but to do so without coercion and with as little overt discrimination as possible.

International Nuclear Fuel Cycle Evaluation

Indeed, one of the basic problems in the design of non-proliferation policy is the discrimination issue. By its very nature, non-proliferation involves a degree of discrimination. Yet the way in which that discrimination is handled can spell the difference between success and failure in a policy of regime maintenance. Thus the Carter Administration deferral of reprocessing at home was not expected to lead all other countries to follow suit. But it was felt that exaggerated projections of nuclear growth and spurious economic calculations were driving decisions in this and other countries. Our diplomatic efforts to persuade others to look more carefully at their calculations and at the problems associated with plutonium would be undercut if we did not restructure our domestic programs to defer plans for thermal recycle and stretch out the timing of breeder development. Since the United States could not unilaterally impose its will on others concerning how the nuclear fuel cycle should be constructed, six of the seven points in President Carter's April 7, 1977 non-proliferation statement dealt with issues within U.S. domestic jurisdiction. The seventh point proposed an International Nuclear Fuel Cycle Evaluation program (INFCE)—a rather special form of conference diplomacy.

INFCE has been described as a pioneering effort at international technology assessment. Officially, INFCE provided a 2-year period in which nations could reexamine assumptions and search for ways to reconcile their different assessments of the energy and non-proliferation risks involved in various aspects of the nuclear fuel cycle. While officially INFCE was given a predominantly technical rationale, it was a means of attracting broad participation into what was really part of a political process of stabilizing the basis for the international regime. The 66 countries and organizations that

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came together in Vienna included consumers and suppliers, rich and poor, East and West, and a dozen countries that had not signed the NPT.

In all, 519 experts from 46 countries participated in 61 meetings of 8 working groups, and produced 20,000 pages of documents. The common denominator of this diversity was the final plenary conference finding that INFCE had "strengthened the view that effective measures can and should be taken to minimize the danger of proliferation of nuclear weapons without jeopardizing energy for peaceful purposes . . . The participants were determined to preserve the climate of mutual understanding and cooperation in the nuclear energy field that is one of the major achievements of the INFCE."[19]

As a diplomatic device, INFCE helped to re-establish a basis for concensus on a refurbished regime for the international nuclear fuel cycle. The very process of engaging in international technology assessment helped to heighten awareness of the non-proliferation problem and the threats to the regime. In that sense, INFCE helped us to set the agenda for other governments. Moreover, it affected the process inside the other governments. Foreign offices, rather than just nuclear energy agencies, became more involved. Critics who complained that INFCE failed to discover a technical fix or failed to endorse all of the American program miss the point. Most important, attention to the problem and to regime maintenance was spread beyond the United States. While the United States did not always agree with all the details of INFCE's answers, a critical point was that INFCE focused other countries' attention on our question—non-proliferation. Equally important in regime maintenance was the way that the INFCE findings helped in diffusing some of the sharp conflicts over the tension between the suppliers' guidelines and the NPT. This was clear at the 1980 NPT Review Conference where expected friction over fuel cycle issues proved far less contentious than general disarmament questions.

A Delicate Balance

The general disarmament issue raises interesting and difficult questions about relations among regimes. International regimes co-exist in different issue areas with a degree of autonomy from each other. Nonetheless, they also exist within an overall political context and can have a net strengthening or weakening effect on each other. In one direction the non-proliferation regime interacts with other nuclear weapons and arms control regimes, and in the other direction with international energy and economic regimes. A successful non-proliferation policy in the 1980s will require attention to the connections in both directions.

The relation between non-proliferation and other arms control regimes is not so simple as it first appears. The usual connections are made by provisions like Article 6 of the NPT and by various U.N. Disarmament Committee resolutions calling for a halt to the "vertical proliferation" of the arms of the superpowers.

This gives rise to certain paradoxes in non-proliferation policy. Ironically, calculability and stability of deterrence between the United States and the U.S.S.R. have occurred over time and at high levels of weaponry. By his-

torical evolution this pattern has produced prudence in the relationship of these two nations and extended deterrence to their allies who have thus been able to eschew the development of nuclear weaponry. Changes in the balance which are perceived as weakening the credibility of deterrence not only threaten the stability of the central relationship, but also reduce the sense of security that permits allied states to foreswear proliferation. It is paradoxical but true that under some circumstances the introduction of a single weapon in a new state may be more likely to lead to nuclear use than the introduction of an additional thousand each by the United States and the U.S.S.R.

On the other hand, to profess indifference to the superpower nuclear arms relationship can weaken the non-proliferation regime in two different ways. First, a disdain for the arms control institutions and concerns expressed by non-weapons states can exacerbate the discrimination issue that is the central dilemma in non-proliferation policy. Second, nuclear doctrines and deployments which stress the usefulness of nuclear weapons in warfighting situations may help to increase the credibility of deterrence, but they also tend to make nuclear weapons look more attractive to others. If states that have deliberately eschewed nuclear weapons see them treated increasingly like conventional weapons, they may one day reconsider their decisions. In short, the relation between non-proliferation and the general nuclear arms control regimes will require a sensitivity to both horns of the dilemma in what promises to be a difficult period in the superpower relationship.

In the realm of energy and economic regimes, it is important that the moderate restrictions of an evolutionary approach to the nuclear fuel cycle not appear as a general posture of technology denial by advanced countries. Threats that poor countries will go nuclear to turn the terms of the North-South dialogue are not particularly credible because nuclear weapons are so ill-suited to such a purpose. But indifference to the energy and economic concerns of poor countries can weaken the non-proliferation regime. A forthcoming posture on energy and technology transfer including the development of non-nuclear energy alternatives, and other measures to deal with energy insecurity, can help take the edge off confrontations which may generate spiteful dynamics over status and attention rather than security.

While national security concerns are the dominant reason for most states to preserve and strengthen the non-proliferation regime, at the same time, it is important not to neglect the status/prestige interests that nations have. Above all, it is important on prestige grounds that overt discriminatory solutions be avoided. Justifiable temporary differentiation and permanent discrimination are not the same thing. We must be careful not to reinforce the illusion that being a nuclear weapon state provides unusual privileges or position in international affairs. The weight of a state's voice in international forums—how it does in the law of the sea, in the exchange rate for its currency, or in resource transfers—really does not have much to do with whether that state possesses a nuclear weapon. There are other more usable and directly effective forms of power. The nuclear weapons states must be careful not to try to use nuclear status to threaten in other

areas. And their general posture in international energy and economic regimes is bound to have an effect on their ability to manage the acceptability of the degree of discrimination that is inherent in the non-proliferation regime.

Three and a half decades have passed since the energy of the atom was used in warfare. Yet rather than nuclear doom, the world has seen a surprising nuclear stability—thus far. While it would be unrealistic not to expect any further nuclear spread, it is still feasible to control the rate and degree of proliferation in order to manage its most threatening and destabilizing effects.

Realistically, an international regime does not need perfect adherence to have a significant constraining effect, any more than deviant behavior means the irrelevance of domestic legal regimes. Nevertheless, there is a tipping point beyond which violations lead to breakdown of normative constraints. The police function is traditionally the domain of the great powers in international politics, but if their preponderance in the nuclear issue area erodes, and they become diverted by other issues, there is a danger that the gradual historical curve of proliferation could approach such a tipping point.

Given the natural decline in American preponderance in the nuclear issue area, it has been important that the burden of leadership in regime maintenance be more broadly shared. To a very considerable extent, INFCE helped to broaden leadership in the job of maintaining the non-proliferation regime. But collective leadership is difficult to manage. The United States still has to adjust to sharing. The wrong unilateral policies could still sacrifice the current modest success in regime maintenance on the altars of either purism or cynicism. Unfortunately, there is no simple solution to the political problem of proliferation. But maintaining the existing regime with its presumption against proliferation is very much in our national interest.[20]

Conclusions: U.S. Foreign Policy and International Regimes

Having described one situation where we have tried to renegotiate a regime at a mega-conference, another where a regime collapsed, and a third where we used a variant of conference diplomacy to help maintain a threatened regime, I am now ready to draw some general conclusions about U.S. foreign policy and international regimes.

1. Because the United States is a great power with a general interest in world order, the maintenance and building of international regimes tends to be in our national interest.

Orderly processes allow us to pursue the multiplicity of our interests in a manner that reduces their mutual interference and the costs of trade-offs. The existence of international regimes allows for greater moderation in foreign policy and reduces the degree of the constant risks that statesmen encounter. For example, even an imperfect non-proliferation regime reduces some of the uncertainties and insecurities that we face abroad.

2. It does not follow that all international regimes are in our interest.

For example, current efforts in UNESCO to negotiate a "New World Information Order" could seriously interfere with journalists' access to news. Many aspects of the "New International Economic Order" stressed in Group of 77 rhetoric in U.N. forums would not serve our interests or the economic interests of many poor countries. It may have been inevitable that the unequal traditional regime in oil would collapse as market power and general political power shifts occurred. And it may be that the absence of a regime has made oil imports more unpredictable and increased our insecurity. But it does not follow that the kind of regime we might recreate in global negotations under imbalanced power conditions and inadequate domestic energy policies would really reduce our uncertainty and insecurity. On the contrary, a bad regime might well increase them.

3. Even if we decide that creating or revising a regime is in our national interest, it does not follow that entering into broad-based conference negotiations is the best way to pursue that interest.

In fact, conference diplomacy is only one among a number of instruments that can be used in the process of regime formulation. While it might seem paradoxical at first, unilateral action can play an important role in regime construction. Indeed, traditionally, the unilateral actions of great powers have been major sources of regime formation. As we have seen, this is less the case under current political conditions, but there is still a role for unilateral actions. Exercising leadership often requires someone to go first. The crucial points are that the unilateral actions should not prevent subsequent inducement of others to follow and that the actions be consistent with a nation's long-term regime goals.

In the oceans area, Truman's proclamations in 1945 failed to meet these criteria. Similarly our 1976 fisheries legislation did not help regime

leadership since we were eroding constraints before the negotiations were over. On the other hand, carefully formulated interim legislation to encourage the beginning of seabed mining probably helped to move law of the sea negotiations forward. In the non-proliferation area, American announcement of domestic changes in fuel cycle practices was coupled with the invitation to all states to join in the International Nuclear Fuel Cycle Evaluation which helped to find a formula for smoothing over the tensions between the Nuclear Suppliers Group and the Non-Proliferation Treaty. Conversely, some of the unilateral provisions of the Nuclear Non-Proliferation Act of 1978, which were inserted at congressional insistence, created international friction and resentment which tended to weaken the administrations' efforts to refurbish the regime.

A special form of unilateral instrument is the use of military force. Judiciously used (or threatened), military force can play a critical role in regime formulation. The knowledge that great powers can and would, at least in principle, assert and defend their naval rights of passage through contested waters certainly played a useful background role in the bargaining at the Law of the Sea Conference. As we saw when we looked at the case of oil, force is an important background consideration in that area as well. On the other hand, indiscriminate use of force can prove too costly in relation to the particular interests sought. Trying to seize the oil fields can bring an economic disaster. Shooting our way through straits can poison bilateral relations with states whose cooperation we need in other issues on our complex foreign policy agenda. Moreover, the use of force may generate resentment which can interfere with broader alliance relationships or with negotiations for regime formulation. A key consideration is the coupling of force with legitimacy. If military actions are broadly regarded as justifiable, at home and abroad, the cost of the military instrument can be reduced. Above all, it is critical that unilateral actions, including the use of force, be considered in relation to our overall policy goals for a regime and to their impact on our bilateral or multilateral negotiations before they are attempted.

4. A conclusion that follows from the previous two is that the United States must see a real prospect that negotiations will lead to a satisfactory regime and improved conditions for our interests before we embark upon such a complex and lengthy process. We need to ask ourselves at least four questions before starting.

- First, what is the nature of the issue? If it clearly involves collective or indivisible goods, how many key actors must be involved to create or preserve an effective regime? The same questions can be asked about divisible goods with the possibility that the key players can be more limited. Given the concentration of technology and capabilities in space, as contrasted with the oceans, there is less incentive to pay the costs of multilateral conference diplomacy. Or in the arms control area, it makes sense to limit participation in the SALT regime (if it lasts), but more players are required at the nonproliferation table by the very nature of the game.

- Second, even if we decide that the nature of the issue requires broad participation, we must ask if the time is ripe for fruitful conference diplomacy. Will our ability to promote and protect our interests improve or erode with time? Would the beginning of negotiations foreclose some options and open a Pandora's box of unmanageable issues? Would failed negotiations make existing difficulties significantly worse? A priori, one would have expected the geographically disadvantaged states in the LOS negotiations to have rallied to the U.S. trusteeship and revenue-sharing proposals of 1970. But they did not. Instead they were recruited via bloc and regional politics into Group of 77 positions largely established by Latin American coastal states who had a 10-year lead in thinking about the issues. By the time the landlocked and geographically disadvantaged states had learned enough to begin careful differentiation of their interests it was largely too late. From the U.S. point of view, we got too far into conference diplomacy before the time was ripe to build the coalitions we needed. And as we have seen when looking at the oil issue, a similar case can be made that whatever the eventual prospects for multilateral negotiations, the time is not ripe for us now.

- A third and related question we must ask is whether the structure of power within an issue area and surrounding it is such that our interests would be served better with or without a regime. As we saw in the case of oil, the erosion of the previous structure of power was to our disadvantage; however, until our domestic and foreign policies have begun to remedy the situation, we may be better off with no regime—bad as that is—rather than with an unfavorable one. On the other hand, in non-proliferation where it was clear that technology would eventually spread and American dominance diminish, we wisely chose in the 1950s to begin construction of a regime before the erosion occurred and in the late 1970s to spread the task of the leadership in regime maintenance through the INFCE process.

- The fourth question we must ask before embarking on complex multilateral diplomacy relates to domestic politics. Can we ratify the results? Are the domestic and congressional perceptions so at odds with what is negotiable internationally that the process will be greeted by Senate rejections? If so, we may be worse off than if we had not entered the process at all, and we should refrain from doing so until education on the issue at home and abroad has progressed further.

5. When we enter multilateral negotiations, we need to prepare ourselves much better for that particular form of activity than we have in the past.

Before agreeing to participate in a conference, we must insist on adequate international preparations. Ideally, a suitable small body should work on texts for submission. Even when this is the case, we must pay closer attention to the effect of bloc politics on the appointment of chairman and drafting officers. Identifying in advance an able president and reasonable chairmen and firmly refusing to agree to others will be crucial.

Much of the difference in the progress between the first and second committees in the LOS conference was attributable to the difference in chairmen, and careful choice of chairmen was one of the keys to the success of INFCE. The agenda is also important. The packaging of issues in committees and sequencing of treatment can strongly affect outcomes. Again the contrast between LOS and INFCE is instructive.

In the substantive negotiations, we must be cautious about making large dramatic compromises in principle only to find that the rigidity of the Group of 77 means that we have given up a principle for nothing. We must be cautious about the slippery slope effect before we decide to alter our positions—whether it be to allow linkage of issues or suggest general approaches to a solution.

We need better preparation domestically as well as internationally. Given the protracted length of negotiations, it is essential that we plan in decade-long terms and try to identify the evolution of our interests, other countries' positions, and possible key branch points before we enter a conference. While such planning can never hope for perfect prescience, both the State Department and the National Security Council can do better in this regard. It is critical to force key trade-offs to high level attention before the real options have been traded away. Given the size and unwieldiness of our delegations (which in turn reflect the diversity of our interests), early clarity of high level instructions is doubly important.

We also need to consider how to relate our domestic and foreign interests on issues which have a leg in each domain. In such transnational systems, our domestic policy actions can complement or undercut our international actions. Often we can add leverage domestically. Certainly, failure to think through the way our domestic and international actions affect each other can lead to a countervailing rather than a reinforcing effect. Thus in 1977, the United States decided to defer the commercialization of plutonium not because we expected all others to follow suit, but because our efforts to induce rethinking and greater caution internationally would be undercut if we were seen to be plunging full speed ahead at home. Similarly, we cannot effectively persuade our allies to reduce oil imports or producers to maintain surge capacity if we are not taking appropriate domestic measures ourselves.

In the oceans area in the 1950s, when Latin American states were arresting our tuna fishermen, we took the pressure out of the transnational system by passing the Fisherman's Protective Act by which our Treasury reimbursed the fishermen for their fines. Passage of the act meant that we "blinked" in the confrontation over principle. On the other hand, on the current question of launching seabed mining, some forms of current domestic insurance for the early stages of investment against the prospect that subsequent international red tape may halt mining could make sense both domestically and internationally.

Finally on the domestic side we need to develop further procedures of congressional involvement in negotiations to protect against later failures to ratify. The LOS advisory process seems to have worked moderately well.

There may be further lessons to be learned from the successful case of the Multilateral Trade Negotiations.

6. My final conclusion from this comparison of changing regime situations in oceans, oil, and proliferation goes back to the question in my title.

Given the history of the oceans issue over the century that I described, and given the costs to our other foreign policy interests if we were to be seen as the cause of a failure, I believe that the best option among those that now face us is to sign and ratify the draft treaty—assuming the remaining issues are satisfactorily dealt with. But we *should* cut our LOSes in the sense of not engaging in another conference like this one in the way we did. That is the purpose of the various suggestions I have made to improve our position.

I expect the United States to remain a dominant power in world politics, but I also expect the complexity of world politics to increase. As a great power with diverse interests, this nation will have a strong interest in the creation and maintenance of satisfactory international regimes. A farsighted international definition of our interest is important to our success in world politics. It is time we paid more careful attention to how we pursue that interest.

Endnotes

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19. "Communique of the Final Plenary Conference of INFCE," February 27, 1980, p. 5.
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U.S. SENATE,
COMMITTEE ON FOREIGN RELATIONS,
Washington, D.C., November 13, 1981.

The PRESIDENT,
The White House.

DEAR MR. PRESIDENT: I understand that you are about to be presented with a set of options relating to the Law of the Sea negotiations. Without knowing the precise formulation of those options, I would like to express my support for the continuing participation of the United States in these negotiations. I think every effort should be made to obtain further improvements in the deep seabed mining portions of the draft treaty and to prevent possible adverse changes in other portions. Since a large number of states may enter into a Law of the Sea Treaty even if the United States chooses not to do so, it is certainly in our interest to continue to influence its content.

I am still hopeful, of course, that the treaty can be improved sufficiently to merit eventual ratification by the United States. But even if you, or the Senate, should subsequently conclude that further steps toward ratification would not be in the interest of the country, I see no advantage in withdrawing from active negotiations at this late stage in the conference.

Sincerely,

CHARLES H. PERCY, *Chairman.*

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